Supreme Court, U.S.
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No. 98-996

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

SAUL NAVAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. *Jurisdiction.* Respondents acknowledge (Br. in Opp. 17) that there is a "disagreement" among the courts of appeals on the jurisdictional question presented in this case—namely, whether the district courts have jurisdiction to review challenges to deportation orders under the general federal habeas corpus statute, 28 U.S.C. 2241. That issue is of great importance in the administration of the immigration laws, and the court of appeals decided it incorrectly. As we explain in our certiorari petition (at 19-24), Congress precluded the district courts from exercising habeas corpus jurisdiction to entertain collateral challenges to orders of deportation in four separate ways: (1) by expressly repealing the habeas corpus jurisdiction formerly provided by the Immigration and Nationality Act (INA), 8 U.S.C. 1105a(a)(10) (1994; repealed 1996), in Section 401(e) of the

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS"); (2) by replacing that provision with a new Section 1105a(a)(10) that expressly precludes judicial review of deportation orders entered against certain criminal aliens, enacted in Section 440(a) of AEDPA, 110 Stat. 1276-1277; (3) by enacting yet another preclusion of judicial review of such orders entered in transitional cases, in Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626; and (4) by enacting the sweeping, permanent jurisdiction-limiting provision of 8 U.S.C. 1252(g) (Supp. III 1997), in Section 306(a) of IIRIRA, 110 Stat. 3009-612.

The disagreement on the jurisdictional issue in the lower courts is extensive. The First, Second, and (now) Third Circuits have held that Congress has *not* precluded aliens' access to the district courts to raise collateral challenges to the merits of their deportation orders under 28 U.S.C. 2241;[1] the Ninth Circuit has held that Congress *has* precluded such access, but that that preclusion is unconstitutional;[2] and the Seventh and Eleventh Circuits have held that Congress has eliminated the district courts' jurisdiction to review deportation orders under 28 U.S.C. 2241, and that that preclusion is constitutional.[3] This Court's review is needed to resolve

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[1] See *Goncalves* v. *Reno*, 144 F.3d 110, 122-123 (1st Cir. 1998), petition for cert. pending, No. 98-835 (filed Nov. 18, 1998); *Jean-Baptiste* v. *Reno*, 144 F.3d 212, 218-220 (2d Cir. 1998), petition for reh'g pending (filed July 6, 1998); Pet. App. 13a, 27a-30a (decision below, following *Jean-Baptiste*); *Sandoval* v. *Reno*, Nos. 98-1099, 98-1547, & 98-3214 (3d Cir. Jan. 26, 1999).

[2] See *Magana-Pizano* v. *INS*, 152 F.3d 1213, 1216-1220, amended, 159 F.3d 1217 (9th Cir. 1998), petition for cert. pending, No. 98-836 (filed Nov. 18, 1998).

[3] See *LaGuerre* v. *Reno*, Nos. 98-1954 & 98-2613, 1998 WL 912107, at *4-*5 (7th Cir. Dec. 22, 1998); *Rodriguez* v. *Reno*, No. 98-4426, 1999 WL 1762, at *5-*6 (11th Cir. Jan. 4, 1999); *Richardson* v. *Reno*, No. 98-4230,

the disagreement among the lower courts about the proper forum for such judicial review of deportation orders as remains available after Congress's enactment of AEDPA and IIRIRA. See *Sandoval* v. *Reno*, Nos. 98-1099, 98-1547, & 98-3214 (3d Cir. Jan. 26, 1999), slip op. 11 ("The resulting division among the courts on this important issue leaves the definitive interpretation for resolution by the Supreme Court.").

Respondents advance two arguments in an attempt to minimize this conflict among the circuits. First, they argue (Br. in Opp. 13-14) that the disagreement involves only interim provisions of AEDPA and IIRIRA governing judicial review of orders of deportation involving aliens in proceedings on or before April 1, 1997, the general effective date of IIRIRA, and not orders of removal entered after that date.

1998 WL 889376, at *12-*16, *28-*31 (11th Cir. Dec. 22, 1998). Respondents suggest (Br. in Opp. 20-21 & n.19) that the Eleventh Circuit's decisions in *Rodriguez* and *Richardson* do not conflict with the decision below because *Rodriguez* did not concern a criminal alien barred from seeking review of his removal order in the court of appeals, and *Richardson* did not involve an alien who was subject to a final order of removal. In both cases, however, the court framed the issue before it as whether Section 1252(g) altogether precludes the district courts' habeas corpus jurisdiction over immigration cases under 28 U.S.C. 2241. The Eleventh Circuit in *Richardson* therefore ruled that Section 1252(g) "repeals any statutory jurisdiction over immigration decisions other than that conferred by" Section 1252 itself, including "§ 2241 habeas jurisdiction over immigration decisions by the Attorney General under the INA," 1998 WL 889376, at *13, and also rejected Richardson's contention that such preclusion of review in district court violates the Constitution, *id.* at *28-*29. In *Rodriguez*, the court followed its decision in *Richardson* to rule that Section 1252(g) "repeals district court jurisdiction to issue writs of habeas corpus under § 2241 to aliens challenging their removal from the United States," and that "IIRIRA's repeal of § 2241 is not unconstitutional because IIRIRA does not eliminate all judicial review of immigration matters," but rather creates a "consolidated form of judicial review of proceedings to remove aliens from the United States—a petition for review in the court of appeals." 1999 WL 1762, at *5.

That contention is incorrect. The First, Second, and Third Circuits have held that a *permanent* provision of IIRIRA, Section 1252(g)—which broadly provides that, "notwithstanding any other provision of law, no court shall have jurisdiction" to hear challenges to removal orders except as set forth in Section 1252 itself, see 8 U.S.C. 1252(g) (Supp. III 1997)—has no effect on the district courts' jurisdiction under 28 U.S.C. 2241.[4] See note 1, *supra*. Respondents have offered no reason why district courts in those circuits, bound by those decisions, will not conclude in the future that, despite Section 1252(g), they may exercise jurisdiction to review orders of removal under 28 U.S.C. 2241 at the behest of criminal aliens who are deemed barred by IIRIRA's permanent preclusion of review provision, 8 U.S.C. 1252(a)(2)(C) (Supp. III 1997), from raising claims by petitions for review directly in the courts of appeals.[5]

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[4] See *Goncalves*, 144 F.3d at 122-123; *Jean-Baptiste*, 144 F.3d at 218-220; Pet. App. 29a-30a (relying on *Jean-Baptiste*); *Sandoval*, slip op. at 20-22. Moreover, respondents defend (Br. in Opp. 15-16) this aspect of the court of appeals' decision as a correct application of the presumption against implied repeal of habeas corpus jurisdiction articulated in *Felker* v. *Turpin*, 518 U.S. 651 (1996), and as avoiding constitutional questions about Section 1252(g). As the Eleventh Circuit observed in *Richardson*, however, *Felker* does not support the Second Circuit's construction of Section 1252(g) in the decision below, because the repeal of jurisdiction under Section 1252(g), in contrast to the statute examined in *Felker*, is comprehensive. "Unlike *Felker*, the language of [Section 1252(g)] does not require repeal by implication. Indeed, Congress could hardly have chosen broader language to convey its intent to repeal any and all jurisdiction except that provided by [the INA itself.]" *Richardson*, 1998 WL 889376, at *14. Further, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," expressly repealed the provision for habeas corpus review in 8 U.S.C. 1105a(a)(10). Congress thus left nothing to implication. See *Sandoval*, slip op. at 34 (Alito, J., concurring in part and dissenting in part); *LaGuerre*, 1998 WL 912107, at *3.

[5] As we explain in our certiorari petition (at 14-15), respondents Navas and Henderson attempted to advance their claims by filing petitions for

Respondents also argue (Br. in Opp. 17-20) that the conflict among the circuits is limited to the *forum* (court of appeals or district court) in which challenges to deportation orders may be heard, and does not concern the permissible scope, after IIRIRA, of judicial review. That disagreement as to the proper forum in which challenges to deportation orders may be pursued, however, is of fundamental significance to the administration of the Nation's immigration laws. As we have explained (Pet. 21-24; 98-835 Pet. 15-17; 98-836 Pet. 21-25), Congress has long perceived that challenges to deportation orders in district courts carry the potential for considerable delay in deporting aliens, and has therefore consistently channeled judicial review of such orders to the courts of appeals. See also *Stone* v. *INS*, 514 U.S. 386, 399 (1995); *Foti* v. *INS*, 375 U.S. 217, 224 (1963). The court of appeals' decision in this case departs from that consistently expressed congressional preference for review in the courts of appeals (as that court acknowledged, see Pet. App. 30a n.9). Indeed, it turns the congressionally enacted structure for review of immigration decisions upside down, for it

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direct review in the court of appeals. The court of appeals, however, believing itself bound by language in its earlier decisions in *Jean-Baptiste* v. *Reno*, *supra*, and *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 28 (2d Cir. 1996), concluded that Section 309(c)(4)(G) of IIRIRA and Section 440(a) of AEDPA eliminated its jurisdiction to review any of the claims in those petitions for review, including the constitutional claims. See Pet. App. 27a, 30a. We also point out in our certiorari petitions in *Goncalves* (98-835 Pet. 19 n.10, 24 n.15) and *Magana-Pizano* (98-836 Pet. 16-17 n.9, 26) that courts are likely to construe IIRIRA's permanent preclusion of review provision covering criminal aliens, 8 U.S.C. 1252(a)(2)(C) (Supp. III 1997), in conformity with Section 309(c)(4)(G) of IIRIRA and Section 440(a) of AEDPA. Although respondents observe (Br. in Opp. 14-15) that their petitions for review are not governed by the permanent rules of Section 1252(a)(2)(C), they advance no reason to believe that the courts will construe that provision differently than they have construed the earlier, similar provisions restricting judicial review of petitions filed by specific classes of criminal aliens.

permits criminal aliens opportunities for *greater* review (and delay) of their deportation orders by allowing them to proceed as an initial matter in the district court rather than the court of appeals, where all other aliens have been required to proceed—previously under 8 U.S.C. 1105a(a) (1994), and now under 8 U.S.C. 1252(a) (Supp. III 1997).[6] Moreover, administrative and judicial proceedings involving thousands of aliens similarly situated to respondents are still pending in the lower courts and before the Board of Immigration Appeals (see Pet. 23-24), and it is vitally important that the government, those aliens, and the lower courts know where (if anywhere) such cases may be brought. This Court's review of the court of appeals' decision is therefore warranted.[7]

2. *Merits.* Respondents argue (Br. in Opp. 21-22) that the court of appeals correctly rejected the Attorney General's decision in *In re Soriano* (Pet. App. 389a-402a). In *Soriano*, the Attorney General construed Section 440(d) of AEDPA, which bars certain classes of criminal aliens from discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), to apply to all deportation proceedings pending at the time of AEDPA's enactment. In contrast to the decision below, however, the Seventh Circuit has concluded that the Attorney General's decision in *Soriano* is correct. *LaGuerre* v. *Reno*, Nos. 98-1954 & 98-2613, 1998 WL 912107 (Dec. 22,

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[6] See also *LaGuerre*, 1998 WL 912107, at *3 (noting that if IIRIRA were construed as respondents suggest, then "Congress accomplished nothing toward its aim of curtailing judicial review" for criminal aliens, and "[m]aybe less than nothing, if * * * Congress simultaneously opened the door to review by the district courts followed by review by the courts of appeals").

[7] For further discussion of the jurisdictional question presented, we also refer the Court to our petitions and reply briefs in *Goncalves* (98-835 Pet. 14-24; 98-835 Reply Br. 1-6) and *Magana-Pizano* (98-836 Pet. 14-29; 98-836 Reply Br. 1-10).

1998). The Seventh Circuit observed, moreover, that the application of Section 440(d) to pending cases does not implicate the presumption against retroactivity because "[i]t would border on the absurd to argue that these aliens might have decided not to commit [their] crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *Id.* at *5. Given the conflict of authority on a matter affecting thousands of aliens already in deportation proceedings or pursuing federal-court litigation (see Pet. 24, 26), review of the lower court's decision on the merits is warranted.[8]

According to respondents (Br. in Opp. 24-26), the court of appeals correctly inferred that Section 440(d) of AEDPA does not apply to pending cases from the fact that Congress explicitly provided in AEDPA that other changes to the immigration laws were to be applied to pending cases. But, as we have noted (Pet. 25-26 n.14), the most relevant points of comparison to Section 440(d) are found in Subtitle D of

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[8] Although the Seventh Circuit concluded in *LaGuerre* that the district court had no jurisdiction over the aliens' habeas corpus petitions (see p. 2 & n.3, *supra*), it also noted the possibility that the aliens might be able to raise their claims by petitions for review in the courts of appeals, see *LaGuerre*, 1998 WL 912107, at *4-*5, and it addressed the merits of their contentions "lest [the aliens] feel that [the court has] tripped them up on a technicality" (namely, having filed "in the wrong court under the wrong statute"), *id.* at *4. Even if the *LaGuerre* court's discussion of the merits of the aliens' claims was technically dictum, it will almost surely be followed by subsequent panels of that court, just as the court of appeals in this case believed itself bound by language in *Jean-Baptiste*, arguably dictum, concerning the continued availability (after enactment of IIRIRA) of district court jurisdiction under 28 U.S.C. 2241. See Pet. App. 27a-30a (following *Jean-Baptiste*); *Jean-Baptiste*, 144 F.3d at 220 (stating that "§ 2241 habeas review survives the amendments to the INA enacted by [IIRIRA]"); *ibid.* (observing that aliens in that case had not invoked Section 2241 habeas corpus jurisdiction).

At best, *Vargas* is not inconsistent with Yesil's contention that the seven-year clock continues to run after the BIA's final order of deportation. *Vargas* simply does not, however, hold that the clock in fact continues to run.

Yesil also relies on *Anderson v. McElroy*, 953 F.2d 803 (2d Cir.1992), and two unreported BIA decisions, *In re Veloso-Erbetta*, A 37 465 465 (BIA Jan. 24, 1990) (see R. 67-70), and *In re Pichardo*, A 40 077 409 (BIA Apr. 5, 1993) (see R. 83-84). Those decisions involved situations where INS or the BIA agreed to remand a case to the IJ to consider a section 212(c) application where the alien acquired the necessary seven years after the IJ's initial decision but before the BIA issued a final order of deportation. *Anderson*, 953 F.2d at 806; *Veloso-Erbetta*, slip op. at 4 (*see* R. 70); *Pichardo*, slip op. at 2 (*see* R. at 84). These cases are therefore distinguishable from the present situation, for the required seven years were accrued in those cases before the BIA issued its final order of deportation.

I am not persuaded that Yesil continued to accrue time toward the seven-year requirement after the BIA issued its final order. Although I agree that Yesil did not lose his permanent resident status after issuance of the BIA's order to the extent that (i) he could file a motion to reopen and (ii) he would be eligible for relief in the event he otherwise prevailed,[14] the BIA's view that an alien cannot continue to accrue time toward the

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[14] *See Goncalves*, 6 F.3d at 834: "[T]he alien remains free to appeal the denial of discretionary relief to the courts. The entry of the Board's final order does not 'change' his 'status' for this purpose (if it did, it would moot the appeal by making it impossible for the alien to receive 'discretionary relief' even if he wins)."

seven years after issuance of a final order of deportation is not unreasonable. *See Jaramillo*, 1 F.3d at 1154 (finding to be "reasonable and permissible" Board's reasoning that "permitting lawful residence time to accrue pending review by the court of appeals would be unacceptable, because the appellate courts' scope of review is limited to errors of law or unfairness in procedure," and because "spurious appeals" would be encouraged). It should also be noted that in *Vargas* the Second Circuit cited as a reason for its ruling that the alien could file a motion to reopen that it did not have before it the concern that an alien was manipulating deportation proceedings "so as to acquire the seven years of domicile." 938 F.2d at 361.

In sum, Yesil's alternative argument on the merits is rejected.

E. *Venue*

I discuss venue briefly only to make the following observations. I am reluctant to second-guess the IJ and BIA on the question of venue, for issues such as administrative convenience and the availability of witnesses are matters committed to their discretion. The IJ, however, did not decide the venue question because he wanted to resolve the issues of deportability and Yesil's eligibility for section 212(c) relief first. Once he determined that Yesil was deportable and was not eligible for section 212(c) relief, he denied the venue motion essentially as moot, without ever considering the venue question on the merits. The BIA affirmed.

The IJ's refusal to consider the venue motion on the merits might very well have determined the outcome of the case, given the lack of consensus in the circuits on

different important legal issues. The IJ engaged in circular reasoning in such a manner as to deprive Yesil of the right to have his venue motion decided on the merits, possibly to his great detriment. The IJ declined to rule on the venue question because he wanted first to rule on deportability and eligibility for the waiver. Yet, he declined to apply Second Circuit law because, in his view, the case arose outside the Second Circuit. (R. 206). Moreover, because he did not apply Second Circuit law, he found that Yesil was not eligible for the waiver. Finally, because he concluded that Yesil was not eligible for the waiver, he found that it was unnecessary to decide the venue question. If, of course, the IJ had decided the venue question first and agreed with Yesil that a change in venue to New York was appropriate, Second Circuit law would have been applied and there could very well have been a different result.

CONCLUSION

For the foregoing reasons, the petition is granted. This case is remanded to the BIA for consideration on the merits of Yesil's application for section 212(c) relief and for further proceedings not inconsistent with this opinion. The venue question is to be resolved before the application for section 212(c) relief is decided.

SO ORDERED.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 96 CIV. 8409 (DC)

ENGIN YESIL, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
RESPONDENTS

July 14, 1997

OPINION

Before: CHIN, District Judge.

On February 27, 1997, I issued an opinion in this case granting Engin Yesil's petition for a writ of habeas corpus. *Yesil v. Reno*, 958 F. Supp. 828 (S.D.N.Y. 1997). I held that sections 401(e) and 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") did not deprive the district courts of habeas corpus jurisdiction to review final orders of deportation of aliens in custody in violation of the Constitution or laws of the United States. I granted the petition because I concluded that the Board of Immigration Appeals (the "BIA") had erred in holding that Yesil was ineligible to be considered for a waiver of deportation under section 212(c) of the Immigration and

Nationality Act, as amended (the "INA"), 8 U.S.C. § 1182(c), because he had not been a lawful permanent resident for seven years at the time he applied.

On March 10, 1997, the Government moved for reconsideration of my opinion based on a decision of the Attorney General of the United States issued on February 21, 1997. *Matter of Soriano*, slip op. (Atty. Gen. Feb. 21, 1997). Reversing an *en banc* decision of the Board of Immigration Appeals (the "BIA"), Interim Decision No. 3289, 1996 WL 426888 (BIA June 27, 1996), the Attorney General held in *Soriano* that section 440(d) of the AEDPA applies to applications for section 212(c) relief submitted prior to April 24, 1996, the effective date of the AEDPA. Section 440(d), as amended by section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (the "IIRIRA"), renders ineligible for section 212(c) relief aliens convicted of certain crimes, including aggravated felonies.

The Government argues in essence that the issues addressed in my February 27, 1997 opinion are irrelevant and that, in accordance with the Attorney General's decision in *Soriano*, Yesil—as a convicted aggravated felon—is ineligible under section 440(d) for section 212(c) relief, no matter how many years he has been a lawful permanent resident, no matter how many consecutive years he has been a lawful domicile. The Government takes this position even though section 440(d) did not become law until more than two years after deportation proceedings had been commenced against Yesil, and even though Yesil would have been considered for section 212(c) relief before the AEDPA took effect had the Immigration Judge (the "IJ") and

BIA not erroneously declared him ineligible on other grounds during the deportation proceedings. The Government argues that because section 440(d) renders Yesil statutorily ineligible for section 212(c) relief, Yesil cannot show a "threat of a fundamental miscarriage of justice" entitling him to habeas corpus relief.

In its reply memorandum, the Government further argues—in a display of sheer arrogance—that even if I were to deny its present motion for reconsideration, the Immigration and Naturalization Service ("INS") could nonetheless proceed to deport Yesil on grounds that the Government has yet to raise. Even though the Government has moved for reconsideration on the basis of *Soriano*, the Government suggests in its reply memorandum that all of the issues now before me would be academic if I were to reject its arguments because—"regardless of the Attorney General's decision in *Soriano*"—INS could simply terminate the instant deportation proceedings and "reinitiate removal proceedings" against Yesil pursuant to section 309(c)(3) of the IIRIRA. (Govt. Reply Mem. at 28). Hence, the Government is suggesting that it is holding in reserve yet another card, a card that it will play if its present motion for reconsideration is denied.

The Government's arguments are rejected. Yesil has shown a "threat of a fundamental miscarriage of justice," and I hold that section 440(d) of the AEDPA may not be lawfully applied to applications for section 212(c) relief pending when the AEDPA was signed into law. Moreover, the Government may not circumvent my rulings by now relying on section 440(d), even if it may be applied to pending cases generally, or section 309 of the IIRIRA or any other newly enacted provision of

law. Yesil is entitled to a hearing on the merits on his section 212(c) application. Accordingly, the motion for reconsideration is denied in all respects.

BACKGROUND

A. *Facts and Procedural History*

The facts and procedural history are set forth in detail in my February 27, 1997 opinion and will not be repeated here.

In my February 27th opinion, I held that this Court had personal jurisdiction over the district director of INS in Louisiana, that the abuse of writ doctrine was not a bar to Yesil's seeking relief in these proceedings, that sections 401(e) and 440(a) of the AEDPA did not deprive the district courts of subject matter jurisdiction to entertain challenges to final deportation orders brought by petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2241, and that the IJ and BIA had erred in holding that Yesil was not eligible to be considered for section 212(c) relief because he had not been a lawful permanent resident for seven years. In the latter respect, I held that Yesil was eligible to be considered because he had been lawfully domiciled in the United States for seven continuous years and was a lawful permanent resident at the time of his application.

The issues raised by the present motion for reconsideration were not reached in my February 27th opinion because, as the Government stated at page 43, footnote 15 of its January 30, 1997 memorandum of law in opposition to the petition, the Attorney General was still then "considering whether to apply AEDPA

§ 440(d) to 212(c) applications filed before April 24, 1996."

The Attorney General decided that question when she issued her opinion in *Soriano* on February 21, 1997, six days prior to the issuance of my opinion in this case. The United States Attorney's Office for the Southern District of New York, however, did not learn of the Attorney General's decision until March 3, 1997. The Government filed the instant motion for reconsideration on March 10, 1997.

B. *Section 440(d)*

The AEDPA was signed into law by the President on April 24, 1996. Section 440(d) of the AEDPA amended section 212(c) of the INA, a long-standing "humane provision" of law that gave lawful permanent residents the right to seek relief if they became subject to deportation because they were convicted of a crime. *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977). In applying for a section 212(c) waiver, a lawful permanent resident could point to factors such as ties to the United States, the effect of deportation on the individual's family, proof of rehabilitation, service to the community, and other evidence of good character.

Section 440(d) sharply limited section 212(c) by barring relief for individuals who were deportable because they had committed certain categories of offenses,[1]

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[1] Section 440(d) amended section 212(c) to read as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful

including: (1) an aggravated felony; (2) a controlled substance violation; (3) a firearm offense; (4) one of various miscellaneous crimes; or (5) two or more crimes involving "moral turpitude." Hence, lawful permanent residents convicted of one of these offenses were no longer eligible for section 212(c) relief, no matter how many years they had been lawfully domiciled in this country.[2]

> unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). *This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are,* ***without regard to the date of their commission, otherwise*** *covered by section 241(a)(2)(A)(i).*

INA § 212(c), as amended by AEDPA § 440(d), as further amended by IIRIRA § 306(d) (emphasis added). The underscored language replaced language disqualifying from section 212(c) relief aliens convicted of aggravated felonies for which they had served a term of imprisonment of at least five years. The boldfaced language was added by section 306(d) of the IIRIRA in what was labelled a "technical amendment." Pub. L. 104-208, Div. C, 110 Stat. 3009-612 (Sept. 30, 1996).

Section 212(c) was repealed, effective April 1, 1997, by section 304(b) of the IIRIRA. The IIRIRA replaced section 212(c) relief with a new form of relief for lawful permanent residents, called Cancellation of Removal, designated section 240A(a) of the INA. See IIRIRA § 304(a)(3).

[2] Under these provisions, "a legal permanent resident convicted of one minor drug possession charge, or two misdemeanor petty theft or public transportation fare evasion charges--turnstile jumping in the New York City subway system leading to a 'theft of

Section 440(d) is silent as to whether it applied to pending cases. INS took the position, however, that section 440(d) applied to all deportation cases pending when the AEDPA took effect, as well as, of course, to deportation cases subsequently commenced. This set the stage for the resolution of the issue in *Matter of Soriano.*

C. *Soriano*

1. *The BIA's Decision*

Bartolome Jhonny Soriano arrived in the United States as a lawful permanent resident in March 1985. In May 1992, he was convicted of attempted criminal sale of a controlled substance. On the basis of that conviction, INS commenced deportation proceedings against him. During the course of the proceedings, Soriano applied for section 212(c) relief. In October 1995 the IJ found that Soriano was eligible for section 212(c) relief, but denied the application in the exercise of his discretion.

Soriano appealed to the BIA. Thereafter, while the appeal was pending, the AEDPA became law. Al-

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services' misdemeanor conviction is considered a crime of 'moral turpitude'—is now subject to automatic deportation without any opportunity to [apply for section 212(c) relief]." *Mojica* v. *Reno*, Nos. 97 CV 1085, 97 CV 1869(JBW), 1997 WL 357808, at *3 (E.D.N.Y. June 24, 1997).

On July 3, 1997, Judge Weinstein issued an amended opinion amending and superseding his June 24, 1997 opinion. The July 3, 1997 opinion is not yet available on-line. The Court has been advised, however, that the changes are entirely nonsubstantive in nature and thus it will rely on the June 24, 1997 version.

though Soriano had been eligible for section 212(c) relief when he requested the waiver, under section 440(d) he would no longer be eligible because his conviction fell within one of the categories covered by section 440(d). INS took the position before the BIA that section 440(d) applied to pending applications and thus it argued that Soriano was barred from seeking section 212(c) relief.

The six-member majority disagreed. First it concluded, however, that Congress did not expressly provide for an effective date for section 440(d). *Matter of Soriano*, Interim Decision No. 3289, 1996 WL 426888 (BIA June 27, 1996) (hereafter cited as "Int. Dec."). Because Congress had expressly provided for a delayed effective date for other provisions of the AEDPA, the majority held that Congress had intended that section 440(d) be applied immediately upon enactment of the AEDPA, including as a general matter to aliens already in deportation proceedings at the time. (Int. Dec. at 4-5).

The next question addressed by the majority was whether section 440(d) applied to aliens already in deportation proceedings who had applications for section 212(c) relief pending on April 24, 1996. The majority determined that Congress had not intended for section 440(d) to apply to pending applications. The majority relied on the fact that section 413 of the AEDPA, which barred alien terrorists from seeking most forms of relief from deportation, expressly provided that it applied to "applications filed before, on, or after" the effective date of the AEDPA, so long as "final action" had not been taken. AEDPA § 413(g). The majority concluded that the presence of this language in section 413(g)

together with the absence of comparable language in section 440(d) showed that Congress had not intended for section 440(d) to apply to applications filed before the AEDPA was enacted. (Int. Dec. at 6-7).

The majority also drew support from the Supreme Court's admonition in *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S. Ct. 1483, 1497, 128 L.Ed.2d 229 (1994), that "settled expectations should not be lightly disrupted." The majority held that "[b]y applying section 440(d) of the AEDPA to only those applications for section 212(c) relief filed on or after the date of enactment of the AEDPA, the unique expectations of aliens whose applications for section 212(c) relief were pending prior to the enactment of the AEDPA are not disrupted." (Int. Dec. at 7). The majority concluded that these aliens had the "expectation that although they were deportable under various provisions of the [INA], they would be able to present evidence of favorable social and humane considerations that might countervail evidence of their undesirability as lawful permanent residents." (*Id.*).

Finally, on the merits of the appeal, the majority concluded that the IJ had properly exercised his discretion in denying Soriano's application for section 212(c) relief. (Int. Dec. at 8-9).

One member of the BIA concurred in part and dissented in part. Board Member Lory D. Rosenberg concurred in the majority's holding that section 440(d) was not applicable to pending applications for section 212(c) relief. She dissented, however, from the majority's conclusion that section 440(d) could otherwise be applied to deportation proceedings commenced before April

24, 1996, where the alien had not yet applied for section 212(c) relief. (Int. Dec. at 10, 12, 20).

The five dissenting members disagreed with the majority's conclusion that section 440(d) applied to pending applications. The dissent was of the view that a section 212(c) application is an "ongoing application" and that an applicant for such relief had to qualify under the law in existence "at the time the application is finally considered." (Int. Dec. at 22). The dissent also concluded that "[l]ike injunctive relief, relief from deportation under section 212(c) of the [INA] is prospective in nature." (*Id.* at 23). Hence, the dissent was of the view that section 440(d) did not operate "retroactively." (*Id.* at 22-23). The dissent also held that "applying the amended section 212(c) provisions to pending applications does not offend any of the concerns underlying the retroactive operation of new statutes." (*Id.* at 23).

2. *The Attorney General's Decision*

The Commissioner of INS referred the *Soriano* decision to the Attorney General for review pursuant to 8 C.F.R. § 3.1(h)(iii). On September 12, 1996, the Attorney General issued an order vacating the BIA's decision in *Soriano* and accepting the matter for review. On February 21, 1997, the Attorney General issued her decision, reversing the BIA and holding that section 440(d) was to be applied to section 212(c) applications pending on April 24, 1996. *Matter of Soriano*, slip op. (Atty.Gen. Feb. 21, 1997) (hereafter cited as "Atty. Gen. Dec.").

The Attorney General decision began its analysis with a discussion of *Landgraf*. As to the threshold

question of whether Congress had "expressly prescribed the statute's proper reach," *Landgraf*, 511 U.S. at 280, 114 S.Ct. at 1505, the Attorney General wrote:

> nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending deportation proceedings, or that it is not to be.

(Atty. Gen. Dec. at 3). The Attorney General's decision does not analyze any of the text of the AEDPA or its legislative history.

The Attorney General then proceeded to discuss whether "the statute would be given retroactive effect if applied in pending deportation proceedings." (Atty. Gen. Dec. at 3). The Attorney General concluded that it would not, because "[t]he relief sought in a section 212(c) application . . . is prospective in nature." (*Id.* at 5). The Attorney General expressed her view that section 440(d), by eliminating her discretion to grant relief in certain cases, merely had the effect of removing jurisdiction. (*Id.*). Because a section 212(c) waiver was "purely discretionary relief from the immigration consequences of a prior criminal conviction," the Attorney General stated that it could not be properly characterized as a "substantive right." (*Id.* at 5-6). Hence, the Attorney General concluded that because section 440(d) merely altered jurisdiction and limited the availability of "future relief," it should be applied to pending applications for section 212(c) relief. (*Id.* at 5). Finally, to address the concern that certain aliens might have conceded deportability before the AEDPA was passed in reliance on the availability of section 212(c) relief, the Attorney General held that aliens with a colorable

defense to deportability could petition to reopen cases for the limited purpose of contesting deportability. (*Id.* at 8).

DISCUSSION

A. *Applicable Legal Standards*

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994), the Supreme Court reiterated the long-standing principle that laws generally should not be given retroactive effect, as it confirmed that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265, 114 S. Ct. at 1497. At the same time, the Court acknowledged the "apparent tension" between the axiom that "'[r]etroactivity is not favored'" and the rule that "'a court is to apply the law in effect at the time it renders its decision.'" *Id.* at 264, 114 S. Ct. at 1496 (quoting *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 2016, 40 L.Ed.2d 476 (1974), and *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 471-72, 102 L.Ed.2d 493 (1988)).

Landgraf and other Supreme Court decisions suggest a three-step analysis for determining whether a newly enacted statute is to be applied to a pending case. First, the court "is to determine whether Congress has expressly prescribed the statute's proper reach." 511 U.S. at 280, 114 S. Ct. at 1505. If so, the inquiry need proceed no further and the court need not "resort to judicial default rules." *Id.*

Second, if "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect." *Id.* The court does so by "ask[ing] whether the new provision attaches new legal consequences to events completed before its enactment," *id.* at 269-70, 114 S Ct. at 1499, and by examining "whether [the statute] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280, 114 S. Ct. at 1505. In making this inquiry, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* at 270, 114 S. Ct. at 1499. If the statute would operate "retroactively" under this analysis, then "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

Third, if a new statute does not have new legal consequences that have a "genuinely 'retroactive' effect," a presumption arises in favor of applying the new law to pending matters; that presumption, however, may be overcome if applying the new law "would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" *Landgraf*, 511 U.S. at 277, 114 S. Ct. at 1503 (quoting *Bradley*, 416 U.S. at 711, 94 S. Ct. at 2016).

The Court in *Landgraf* also emphasized that in considering whether a new law should be applied to pending matters, a court should keep in mind that "application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273, 114 S. Ct. at 1501. Indeed, when the new statute "authorizes or affects the propriety of prospective relief," its application is "not retroactive." *Id.* Like-

wise, statutes "conferring or ousting jurisdiction" that "'speak to the power of the court rather than to the rights or obligations of the parties'" generally do not raise concerns about retroactivity. *Id.* at 274, 114 S. Ct. at 1501-02 (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 99, 113 S. Ct. 554, 565, 121 L.Ed.2d 474 (1992) (Thomas, J., concurring)). Finally, "[c]hanges in procedural rules may often be applied in suits arising before their enactment" without violating the principle against retroactivity. *Id.* at 275, 114 S. Ct. at 1502. In reviewing these permissible applications of new laws to pending cases, however, the Supreme Court reaffirmed "the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." *Id.* at 278, 114 S. Ct. at 1504.

Judge Weinstein recently applied *Landgraf* to the precise question of whether section 440(d) applies to applications for section 212(c) relief pending when the AEDPA became law. In *Mojica* v. *Reno*, Nos. 97 CV 1085, 97 CV 1869(JBW), 1997 WL 357808 (E.D.N.Y. June 24, 1997), Judge Weinstein held that section 440(d) may not be applied to pending cases.[3]

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[3] *Cf. Buitrago-Cuesta v. INS*, 7 F.3d 291, 294-95 (2d Cir. 1993) (holding that section 511(a) of the Immigration Act of 1990, which amended section 212(c) to eliminate eligibility for aliens convicted of aggravated felonies who served at least five years in prison, applied retroactively, because "plain language of the statute indicates a congressional intent that § 511 apply retroactively," and in view of fact that failure to apply section 511(a) retroactively would yield absurd result that the provision would not take effect until three or five years after its enactment).

For the reasons set forth in Judge Weinstein's thorough and scholarly opinion, and for the reasons set forth below, I likewise hold that section 440(d) may not be applied to applications for section 212(c) relief pending when the AEDPA was signed into law.[4] First, the text of the AEDPA and its legislative history demonstrate that Congress did not intend for section 440(d) to apply to pending cases. Second, under the "judicial default" rules, section 440(d) would have retroactive effect, for it does attach new legal consequences to completed events and it disrupts the settled expectations of long-time lawful permanent residents. Third, even assuming section 440(d) does not have retroactive effect, it would be manifestly unjust to apply section 440(d) to Yesil, for his section 212(c) application would have been considered on the merits prior to the passage of the AEDPA had the IJ and the BIA not ignored well-settled Second Circuit law. Finally, the Government's argument that the Attorney General's decision is entitled to great deference is simply not persuasive.

B. *Congressional Intent*

In trying to ascertain whether Congress intended for section 440(d) to apply to pending cases, we must look first at the text of the AEDPA and then at its legislative history. In her decision, the Attorney General did not discuss the language of the statute, other than to conclude in one sentence that "nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending deportation proceedings, or that it is not to be." (Atty. Gen. Dec. at

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[4] Accordingly, I do not reach plaintiff's equal protection argument.

3). The decision fails to discuss the legislative history of the AEDPA at all.

1. *The Text*

Although the Attorney General correctly observes that section 440(d) contains no language addressing its applicability to pending cases, other provisions of the AEDPA do provide guidance. Most notably is section 413, entitled "Denial of Other Relief for Alien Terrorists," which eliminates certain relief from deportation for alien terrorists. Subsection (g), entitled "Effective Date," provides:

> The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to applications filed *before, on, or after* such date if final action has not been taken on them before such date.

AEDPA § 413(g), 110 Stat. 1269 (emphasis added). Hence, when Congress wanted the provisions of section 413 to apply to an alien terrorist whose application for relief from deportation had been filed "before" the effective date of the AEDPA, it said so explicitly.

Section 440(d) is similar to section 413 in that it also limits the ability of an alien convicted of certain crimes to obtain relief from deportation. Although, as section 413(g) demonstrates, Congress obviously knew how to make explicit its desire to apply provisions of the new law to pending cases, it chose not to do so with respect to section 440(d).

Congress also expressly elected to make section 401, which enacted new alien terrorist removal procedures, applicable to prior conduct and events. Section 401(f) expressly provides that section 401 "shall take effect on

the date of enactment of this Act and shall apply to all aliens without regard to the date of entry or attempted entry into the United States." AEDPA § 401(f), 110 Stat. 1268. Congress also made several other provisions applicable to proceedings initiated on or after the date of enactment, thus clearly providing that the proceedings could be based on conduct or events occurring before the AEDPA took effect. *See, e.g.*, AEDPA §§ 421(b), 435(b), 440(f), 441(b), 110 Stat. 1270, 1275, 1278, 1279. *See Mojica* v. *Reno*, Nos. 97 CV 1085, 1869(JBW), 1997 WL 357808, at *45-46 (E.D.N.Y. June 24, 1997). Yet, Congress included no comparable or similar language in section 440(d).

The Supreme Court's most recent discussion of the principles to be applied in determining the retroactive effect of new statutes is instructive, particularly since it concerned the very statute before us—the AEDPA. In *Lindh v. Murphy*, —— U.S.——, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997), the Court was confronted with the issue of whether the amendments to Chapter 153 of Title 28 of the United States Code, enacted by sections 101 to 106 of the AEDPA, applied to cases pending when the AEDPA was enacted. The Court held that they did not, largely because section 107(c) of the AEDPA, which created a new set of rules for habeas corpus proceedings in capital cases (Chapter 154 of Title 28), expressly provided that "Chapter 154 . . . shall apply to cases pending on or after the date of enactment." AEDPA § 107(c), 110 Stat. 1226. The Court held:

> We read this provision of § 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general

> run of habeas cases *only when those cases had been filed after the date of the [AEDPA].*

—— U.S. at ——, 117 S. Ct. at 2063 (emphasis added). The Court concluded:

> We hold that the negative implication of § 107(c) is that the new provisions of chapter 153 generally apply only to cases filed after the [AEDPA] became effective.

Id. at ——, 117 S.Ct. at 2068.

Here, the "negative implication" of sections 401(f), 413(g), 421(b), 435(b), 440(f), and 441(b) is that section 440(d) applies only to applications filed after the AEDPA became effective. If Congress had intended for section 440(d) to apply to pending applications, it is reasonable to assume that Congress would have expressly provided for section 440(d) to apply to pending applications. Moreover, the AEDPA was enacted just two years after the Supreme Court decided *Landgraf.* Hence, it is reasonable to assume that Congress was well aware of the teachings of *Landgraf*—including its admonition that Congress should be explicit when it intended a new law to apply to pending cases—when it elected not to explicitly make section 440(d) applicable to pending cases. *See Lindh,* —— U.S. at —— - ——, 117 S. Ct. at 2063-64 (Congress "could have taken" *Landgraf* as "counseling the wisdom of being explicit if it wanted [the new section 2254(d)] to be applied to cases already pending").

The Government contends that the negative implication argument is "meritless," pointing out in its reply brief that certain provisions of the AEDPA mandate only prospective application. (Govt. Reply Mem.

at 6) (citing AEDPA sections). The Government's suggestion that the negative implication argument is "meritless" is simply wrong, as *Lindh* makes clear. Indeed, in its reply brief, which was filed before the Supreme Court decided *Lindh*, the Government relies on the Seventh Circuit's decision reversed by the Supreme Court in *Lindh*. *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), rev'd, —— U.S. ——, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Moreover, the Government's argument ignores the deep-rooted tradition against retroactivity that the Court reaffirmed, once again, in *Lindh* in discussing the very statute at issue here—the AEDPA. *See also Hughes Aircraft Co.* v. *United States ex rel. Schumer*, —— U.S. ——, —— - ——, 117 S.Ct. 1871, 1874-75, 138 L.Ed.2d 135 (1997) (also reaffirming the " 'presumption against retroactive legislation [that] is deeply rooted in our jurisprudence' ") (quoting *Landgraf*).

In sum, the text of the AEDPA demonstrates Congress's clear intent that section 440(d) not be applied to pending cases.

2. *The Legislative History*

To the extent that any doubt remains after an analysis of the text of the AEDPA, that doubt is eliminated by an examination of its legislative history, which shows that Congress specifically considered—but ultimately rejected—a provision that would have made section 440(d) applicable to pending cases.

On May 25, 1995, one month after the Oklahoma City bombing, Senators Dole and Hatch introduced S. 735, the "Comprehensive Terrorism Prevention Act of 1995." The Act contained a number of provisions relating to immigration, including what would eventually

become section 440(d). *See* 141 Cong. Rec. at S. 7559 (daily ed. May 25, 1995). Section 303(f) of that Act provided that "amendments made by this section shall . . . apply to cases pending before, on or after" the date of enactment. *Id.* at S. 7863 (daily ed. June 7, 1995). Thus, the Senate's version of section 440(d) explicitly provided that it would apply to pending cases.

The House of Representatives adopted its own anti-terrorist legislation—H.R. 2703—in response to the Oklahoma City bombing. The House's version of section 440(d) also limited section 212(c) relief but it did not contain language making the section applicable to cases pending before its enactment. *See* 142 Cong. Rec. at H. 2295 (daily ed. March 14, 1996). Moreover, when the House considered the Senate's bill, the House insisted that its language limiting section 212(c) relief be substituted for the Senate's version and requested a conference on the point.

Thus, two competing versions of legislation limiting section 212(c) relief went to conference—one fully applicable to pending applications for section 212(c) relief, and the other containing no such provision. What emerged from conference, and what was ultimately passed as section 440(d) of the AEDPA, however, was a version of the bill that did not contain the Senate's explicit language of retroactivity. Although other changes were made to the Senate's version and other compromises were struck, the retroactivity language was considered and rejected.

Taken together, the text of the AEDPA and its legislative history demonstrate unequivocally that Congress did not intend for section 440(d) to be applied to pending cases.

C. ***Retroactive Effect***

Under *Landgraf*, the inquiry need proceed no further, as Congress's intent is clear. Nonetheless, application of the "judicial default" rules only confirms that section 440(d) does have "retroactive effect" and that it may not be applied to pending cases. *See generally Mojica*, 1997 WL 357808, at *46- 54.

Section 440(d) has retroactive effect. It attaches new legal consequences to events completed before its enactment, and it impairs important rights possessed by aliens at the time they acted and significantly increases their liability for that past conduct.

Prior to the passage of section 440(d), aliens who became deportable for committing certain crimes knew that there existed the possibility that if they mended their ways and turned over a new leaf, they might be able to obtain relief from deportation. Aliens who were, or with the passage of time would become, eligible for section 212(c) relief knew that if they could rehabilitate themselves, they would have the opportunity to seek relief from the harsh consequences of deportation.[5] Section 212(c) offered these individuals a concrete mechanism for obtaining relief; indeed, statistics

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[5] The Government's assertion that Yesil could not have had a "vested right" or "settled expectation" in section 212(c) relief for these purposes when he pled guilty in August 1990 (Govt. Mem. at 11) is rejected. Yesil certainly could have expected then that if he acknowledged his mistakes, pled guilty, cooperated with the Government to help atone for his crimes, and became a law-abiding and productive member of society, he could seek section 212(c) relief once he was lawfully domiciled for seven continuous years.

submitted by The Legal Aid Society, as amicus curiae, show that in the six-year period from FY 1989 through FY 1994, section 212(c) applications were granted more often than they were denied.[6] Hence, section 212(c) offered these individuals a very real incentive to become productive members of society. Now, despite whatever efforts they might have made in reliance on the availability of section 212(c) relief, despite whatever "expectations" they might have had, the possibility of obtaining relief from deportation would be foreclosed completely if the Government's interpretation of section 440(d) is accepted.

The availability of relief from deportation—even the possibility thereof—is a critical factor to an alien who is considering whether to enter into a guilty plea. *See United States v. Del Rosario*, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring) ("The possibility of being deported can be—and frequently is—the most important factor in a criminal defendant's decision how to plead . . . ."), *cert. denied*, 498 U.S. 942, 111 S. Ct. 352, 112 L.Ed.2d 316 (1990); *Mojica*, 1997 WL 357808, at *49 ("For a non-citizen, the choice to forego trial and plead guilty is often critically dependent on information regarding possible immigration consequences."). An alien who decided to plead guilty to a crime that rendered him deportable might very well have done so with the expectation that if he rehabilitated himself and showed that he was deserving of a second chance, he would have the opportunity to seek relief from

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[6] Of the approximately 20,000 applications during that time frame, some 8400 were granted and some 8100 were denied. The remainder fell into an "Others" category. (Legal Aid Mem., Exh. F).

deportation by way of a section 212(c) application. On the other hand, if he had known that there was no possibility of relief from deportation, if he had known that it was a certainty that he would be banished from this country and separated from his family and friends, he might very well have come to a different conclusion.[7]

In *Soriano*, the Attorney General concluded that applying section 440(d) to pending cases would not have "retroactive effect" because section 212(c) relief is "purely discretionary relief" and not "a substantive right," and that section 440(d) is jurisdictional and prospective in nature. These arguments are rejected.

A right to discretionary relief is still a substantive right, and the elimination of even the possibility of obtaining relief thus has a retroactive effect. *See Warden, Lewisburg Penitentiary* v. *Marrero*, 417 U.S. 653, 663, 94 S. Ct. 2532, 2538, 41 L.Ed.2d 383 (1974) (indicating that a statute taking away parole eligibility for offenses for which parole was available under the law in existence at the time the offenses were committed could be found to be constitutionally impermissible as an ex post facto law); *Lindsey v. Washington*, 301 U.S. 397, 401, 57 S. Ct. 797, 799, 81 L.Ed. 1182 (1937) (holding that a statute changing a maximum sentence to a mandatory sen-

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[7] *See Mojica*, 1997 WL 357808, at *51 ("The importance of immigration consequences of pleas in criminal cases cannot be underestimated. Deportation to a country where a legal permanent resident of the United States has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea.").

tence for offense committed prior to statute's enactment is an impermissible ex post facto law); *see Hincapie-Nieto* v. *INS*, 92 F.3d 27, 30 n. 2 (2d Cir. 1996) (in dictum, stating: "We express no view as to the permissibly retrospective application of Section 440(d), which eliminates what is arguably a substantive right, albeit a right only to discretionary relief."). The simple fact is that many cases that would have resulted in a waiver of deportation before April 24, 1996 would have a different outcome under section 440(d)—certain deportation. Surely this is a substantive change.

Nor is section 440(d) merely jurisdictional in nature, and the Attorney General's argument to that effect is meritless. In this context, a jurisdictional change is one that changes the forum, or jurisdiction, for obtaining relief. A change that eliminates the *only* forum for obtaining the relief, that eliminates eligibility for obtaining the relief all together, cannot be merely jurisdictional. *See Landgraf*, 511 U.S. at 274, 114 S. Ct. at 1501-02 ("Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'") (quoting *Hallowell* v. *Commons*, 239 U.S. 506, 508, 36 S. Ct. 202, 203, 60 L.Ed. 409 (1916)); *accord Hughes Aircraft Co.*, —— U.S. at —— - ——, 117 S.Ct. at 1878-79 (jurisdictional statutes "merely address [] which court shall have jurisdiction," and "[s]uch statutes affect only where a suit may be brought, not whether it may be brought at all").

The Attorney General also concluded that because section 212(c) relief is "prospective in nature" and deportation is akin to an injunction, application of section 440(d) to pending cases is permitted under *Landgraf*.

(Atty. Gen. Dec. at 5). The reference in *Landgraf* to injunctive relief, however, was to injunctive relief "in futuro," such as an ongoing injunction restraining unions from picketing. 511 U.S. at 273-74, 114 S. Ct. at 1501-02. This case is different. Section 440(d) does not affect injunctive relief with respect to future activity; to the contrary, it would alter the "legal consequences" of actions taken by Yesil some ten years ago.

Under the Attorney General's reasoning, any law that affects relief would act prospectively only, as the relief—whether an injunction or damages or relief from deportation—would be imposed or awarded in the future. This interpretation cannot be correct, as *Landgraf* itself demonstrates. *Landgraf* involved compensatory and punitive damages under the Civil Rights Act of 1991 to be awarded in the future. Yet, the Court held that the new law could not be applied to pending cases because it acted retroactively. 511 U.S. at 281-82, 114 S. Ct. at 1505-06.

Finally, as the inquiry here is essentially one of fairness, it is important to consider, from the Government's point of view, the rationale for applying section 440(d) to pending cases. In her decision, however, the Attorney General identified no such purpose; indeed, she made no effort to explain the purpose to be served by construing section 440(d) to apply to pending cases. *Mojica*, 1997 WL 357808, at *42-44. Nor does the Government now, on its motion for reconsideration, identify the purpose to be served by applying section 440(d) to pending cases, other than to state in a footnote in its reply brief that "insofar as the Government clearly has a legitimate interest in protecting society from criminal aliens, section 440(d) is a plainly rational means of

furthering that interest." (Govt. Reply Mem. at 11 n. 2). While that general statement is true as far as it goes, it does not purport to articulate any rational basis for applying retrospectively a provision of law that cuts off an alien's ability to show that he or she has reformed and eliminates his or her incentive to do so. On the other hand, as discussed above, there are compelling reasons not to apply section 440(d) to pending cases. Hence, application of the judicial default rules enunciated in *Landgraf* shows that section 440(d) has retroactive effect.

D. ***Manifest Injustice***

Even assuming section 440(d) does not have retroactive effect and that it should be applied to pending cases in general, it would be manifestly unjust to apply section 440(d) to Yesil. When the BIA issued its final order of deportation in March 1995, Yesil was eligible for section 212(c) relief under well-settled Second Circuit law. Yet, the IJ and BIA erroneously held that he was not. If they had applied the law properly, Yesil's section 212(c) application would have been considered on the merits—before the AEDPA became law on April 24, 1996 or certainly before the Attorney General issued her decision on February 21, 1997 holding that section 440(d) should be applied to pending cases. Hence, fairness requires that Yesil be returned to the position he would have been in had the law properly been applied by the IJ and BIA. If my initial decision is affirmed, regardless of the applicability of section 440(d) to pending cases as a general matter, fairness requires that Yesil's application be considered on the merits—as it should have been in 1995.

E. *Deference*

Finally, the Government contends that this Court's review of the Attorney General's decision must be limited by the deference courts owe to administrative tribunals in their interpretations of statutory law. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984); *see Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996). While I agree with the proposition that administrative agencies should be accorded deference in their interpretation of statutes they are charged with implementing, that proposition has no bearing on the issue at hand.

The Attorney General's opinion in this matter involved no "statutory interpretation." The Attorney General did not analyze the text of the AEDPA or discuss its legislative history in deciding that section 440(d) should apply to pending section 212(c) applications. Indeed, the Attorney General came to the conclusion that "nothing in the language of . . . § 440(d) specifies that it is to be applied in pending deportation proceedings, or that it is not to be." (Atty. Gen. Dec. at 3).

Instead, the Attorney General purported to apply judicially created default rules. Rather than interpret the statute, the Attorney General simply applied or interpreted Supreme Court case law. The Attorney General is not in a better position than this Court, however, to apply judicial default rules. Accordingly, the deference normally accorded to agency interpretation of statutes is wholly inappropriate in this case. *See Mojica*, 1997 WL 357808, at *55-57; *Vargas v. INS*,

938 F.2d 358, 363 (2d Cir. 1991) (administrative agency decision not involving statutory interpretation, but instead involving post-hoc rationalizations of prior decisions, cannot command *Chevron* deference); *Akins* v. *Federal Election Comm'n*, 101 F.3d 731, 740 (D.C. Cir. 1996) (rejecting *Chevron* deference for agency interpretation of Supreme Court ruling).

CONCLUSION

In my February 27th opinion, I commented on the "inexplicable fervor" with which the Government seemed to be proceeding against Yesil. I rejected the Government's arguments, accepted Yesil's, and granted the petition. Rather than simply take an appeal, the Government moved for reconsideration, arguing that a statute that did not become law until April 1996 should be applied to Yesil—even though the only reason his section 212(c) application was not considered prior to the passage of the new law was that the IJ and BIA erroneously declared him ineligible in 1995. Moreover, even as it was moving for reconsideration on the basis of section 440(d), the Government announced that if its motion for reconsideration were denied and its arguments with respect to section 440(d) rejected, it could—regardless of this Court's rulings—proceed on yet another basis (section 309 of the IIRIRA) to deport Yesil.

The Government's mean-spirited relentlessness is difficult to comprehend, in view of the equities of the case.

From the Government's point of view, what is at stake is nothing more than giving Yesil a hearing, an opportunity to say "I deserve another chance," an opportunity to present evidence to an Immigration Judge

who will fairly examine the circumstances and decide whether Yesil is in fact deserving of a second chance. The Government has not identified any compelling public interest that would be undermined by giving Yesil this simple chance to be heard.

On the other hand, from Yesil's point of view, much more is at stake. If he is not given an opportunity to be heard on his section 212(c) application, he will be exiled. He will be banished from what has become his country and home and he will be separated from his family and friends. He will be deported back to a country that he left some 18 years ago, when he was only 16 years old. And the efforts that he has made since he committed his crime in 1987—acknowledging his mistake, pleading guilty, cooperating with law enforcement authorities, risking his life to infiltrate a drug ring, providing leads to a number of arrests and the confiscation of drugs, establishing two legitimate businesses employing hundreds of people, and otherwise becoming a productive and positive member of society—will be swept aside, for no rational purpose and to no apparent end.

The law, the facts, and the equities all point to one result: Motion denied.

On remand, the Government is ordered to provide Yesil a hearing on his section 212(c) application and to consider the application on its merits. The Government may not use section 440(d) of the AEDPA or section 309 of the IIRIRA or any other newly-enacted provision of law to deport him, and the Government is hereby enjoined from doing so.

SO ORDERED.

APPENDIX O

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
26 FEDERAL PLAZA, ROOM 13-130
NEW YORK, N.Y. 10278

File No.: 18 –274- 616

IN THE MATTER OF FRANKLIN HENDERSON,
RESPONDENT

IN DEPORTATION/EXCLUSION PROCEEDINGS

May 2, 1996

ON BEHALF OF RESPONDENT:
Irwin Berowitz, Esquire

ON BEHALF OF SERVICE:
Wayne Kimbell, Esquire

MEMORANDUM OF ORAL DECISION

THIS MEMORANDUM IS A SUMMARY OF THE ORAL DECISION RENDERED AT NEW YORK CITY, NEW YORK. IF THE DECISION IS APPEALED, THE FULL TEXT OF THE DECISION AND ORDER WILL BE TRANSCRIBED AND PROVIDED TO THE PARTIES.

__ The Respondent was ordered deported to _____ or _____.

__ The Respondent was granted/denied *voluntary departure* on or before _____ with an alternate order of deportation to _____.

__ The Respondent was granted/denied Suspension of Deportation under Section 244(a) of the Act.

__ The Respondent was granted/denied *Adjustment of Status.*

__ The Respondent's adjustment of status was/not rescinded under Section 246 of the Act.

__ The Applicant has been ordered excluded and deported.

__ The Applicant was admitted to the United States as a _____ until _____.

__ The Applicant's request to *withdraw* the application for admission to the U.S. was granted, provided departure occurs not later than _____.

__ The Applicant/Respondent was granted/denied *Asylum*/Withholding of Deportation under Section 208(a)/243(h) of the Act.

_X_ The Applicant/Respondent was granted/denied a *waiver* under Section 212(c) of the Act, and proceedings were terminated.

__ Requested relief pursuant to Section ___ of the Act was deemed to be abandoned because of failure to prosecute.

_X_ The proceedings were terminated.

_X_ The Service/Respondent/Applicant has reserved/ waived *appeal*. If appeal has been reversed, appeal must be filed by May 13, 1996.

__ Other _____.

/s/ SARAH M. BURR
SARAH M. BURR
Immigration Judge

APPENDIX P

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
26 FEDERAL PLAZA, ROOM 13-130
NEW YORK CITY, N.Y.

File No. A 18 274 616

IN DEPORTATION PROCEEDINGS

IN THE MATTER OF FRANKLIN HENDERSON,
RESPONDENT

May 2, 1996

Charge: Section 241(a)(2)(B)(i) of the Immigration & Nationality Act, in that the respondent has been convicted of a controlled substance violation.

Applications: Waiver of inadmissibility pursuant to Section 212(c) of the Immigration & Nationality Act.

ON BEHALF OF RESPONDENT:
Irwin Berowitz, Esquire
Bretz & Associates
299 Broadway, Suite 1805
New York, NY 10007

ON BEHALF OF SERVICE:
Wayne Kimbell, Esquire
Deputy District Counsel
New York District

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 56-year old married man, a native and citizen of the Dominican Republic. He is a married to a lawful permanent resident of the United States and has two children, one of whom is a United States citizen and one of whom is a lawful permanent resident. The respondent was originally admitted to the United States as a lawful permanent resident at San Juan, Puerto Rico on or about February 12, 1968, which was over 28 years ago.

Deportation proceedings were instituted when this respondent was served with an Order to Show Cause charging him with deportability under the aforementioned section of the Act (see Exhibit 1). The respondent, through counsel, has admitted the five factual allegations contained in the Order to Show Cause and has conceded deportability. Allegation five of that Order to Show Cause specifies that on May 1, 1987, the respondent was convicted under New York State law for the offense of criminal possession of a controlled substance in the second degree. Based upon the admissions of counsel and based upon the conviction record which has been marked into evidence as Exhibit 3, the Court finds that the evidence of deportability is clear, convincing, and unequivocal. *Woodby v. INS*, 385 U.S. 276 (1966).

During the course of these proceedings, the respondent designated the Dominican Republic as the country of deportation in the event that deportation were to be

ordered. The respondent has submitted an application for relief under Section 212(C) of the Immigration & Nationality Act (see Exhibit 4). That application was submitted to the Court on May 23, 1994 and was marked into evidence as Exhibit 4 on October 12, 1995.

In order to qualify for a waiver of inadmissibility under Section 212(c), an applicant must establish lawful permanent residence, and that following admission as a lawful permanent resident that he has resided in the United States for seven consecutive years. Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility, since it is available only when the applicant establishes that he merits the relief in the exercise of discretion. Clearly, the burden of proof is on the alien to establish both statutory eligibility and the favorable exercise of discretion.

Under traditional 212(c) analysis, the Court must balance the favorable factors in the respondent's case with the negative factors. Essentially, the Court must decide whether the social and humane considerations as presented in the alien's behalf merit the granting of relief and whether the granting of that relief appeals to be in the best interest of this country. *Matter of Edwards*, Int. Dec. 3134 (BIA 1990). In *Matter of Marin*, the Board of Immigration Appeals detailed the favorable factors to be considered and those include residences of long duration in this country, evidence of hardship to a respondent and family if deportation occurs, a history of employment, evidence of value or service to the community, and proof of genuine rehabilitation. The negative factors typically revolve around the criminal record of the respondent, its nature, recency and seriousness.

This case has something of a procedural history. The case was assigned to me today as the Emergency Judge. Previously, this case had been before three prior Immigration Judges, none of whom are sitting at 26 Federal Plaza any longer. Pursuant to 8 C.F.R., and the applicable regulations, I have reviewed the record of proceedings in this case and all the exhibits that have been marked into evidence. I have also reconstructed the prior proceedings with the help of the Government attorney and the respondent's attorneys. Based upon the record of proceedings in this case and based upon my reconstruction of events which is on the tape, I am prepared to render a decision in this case.

In essence, the Government attorney conferenced this 212(c) hearing with the alien's attorney before Judge William Van Wyke on October 12, 1995. At that time, the alien's attorney waived direct examination of his client and the Government attorney engaged in a short cross examination of the respondent. After that cross examination, the Government attorney stipulated on October 12, 1995 that the respondent was entitled to a Section 212(c) waiver in the exercise of the Court's discretion. This stipulation included an acknowledgement that the respondent was a credible witness and that in balancing the factors the favorable exercise of discretion should be exercised on the respondent's behalf. Based upon the record before me I will simply state that the negative factor in this case is the respondent's one drug arrest and one drug conviction. There are a number of favorable factors, including that fact that he has been lawful permanent resident for 28 years, that all of his immediate family resides in the United States, including his wife, his children, and his grandchildren who are all either lawful permanent

residents or citizens of the United States. Additionally, the respondent has a consistent history of employment with the same employer from 1975 until the present, with the exception of his period of incarceration. He has documented the payment of taxes from 1980 until the present, he has a record of excellent adjustment to parole supervision, as well as an exceptionally positive prison record (see Exhibit 5 for corroborating documentation). Clearly, the balancing of the equities in this case falls in the respondent's favor.

At the time the stipulation with regard to discretionary relief was entered into before Judge Van Wyke on October 12, 1995, there was an issue of statutory eligibility. The issue at that point in time was whether the respondent had served five years or more on a aggravated felony conviction and was at that point in time statutorily barred from relief. It should be noted that the Order to Show Cause charges the respondent with a controlled substance violation and not an aggravated felony. However, at the time, the rule in the 2nd Circuit under *Jenkins v. U.S.*, 23 F.3d 11 (2nd Circuit 1994), did hold that criminal possession of a controlled substance is an aggravated felony or a drug trafficking crime under the Immigration laws of this country. *Jenkins*, *supra*, was overruled just recently in the 2nd Circuit in the case of *Aguirre v. INS*, which was decided on March 22, 1996. In the Aguirre case, which dealt with the exact same conviction that this respondent has, which is a conviction for criminal possession of a controlled substance in the second degree, the 2nd Circuit held that the conviction which relates to possession of a controlled substance is not a drug trafficking crime. Under the recent decision in Aguirre, this respondent has not been convicted of an aggravated

felony and therefore the time that he has served, whether it is under five years or over five years is irrelevant. Since the issue of his statutory eligibility was resolved as of March 22, 1996 when Aguirre was decided by the 2nd Circuit, and since there was a prior stipulation on discretionary relief, it seems to this Court that the order granting 212(c) relief should have been entered on the date of the Aguirre decision, which was well prior to the enactment of the Anti-Terrorism Law. In this Court's opinion, this case was decided for all intent and purposes on both statutory and discretionary grounds when the 2nd Circuit vacated their holding in *Jenkins*, which at that time was the only impediment to issuing a grant of a 212(c) waiver in this case. Absent *Jenkins*, a grant of a 212(c) would have been issued on October 12, 1995.

The Government now argues that this respondent is statutorily ineligible for a grant of a 212(c) waiver on the recent law that was signed into enactment by President Clinton on April 24, 1996. The Anti-Terrorism Law under Section 440(b) now makes a lawful permanent resident of this country statutorily ineligible for a 212(c) waiver if they have been convicted a controlled substance violation. The wording of the new law is clear as to whom it barrs [sic]. It is still not clear to this Court as to when those provisions go into effect. However, before I address my reservations as to the effective date of the Act, I wish to address some more basic considerations with regard to the Anti-Terrorism Bill and the essentially dismantling of Section 212(c) relief.

I believe that I am bound by the rationale that has been expressed by the 2nd Circuit in *Francis v. INS*, 532 F.2d 268 (2nd Circuit 1976). I believe that in both

the *Francis* case and in a subsequent case entitled *Bedoya-Valencia v. INS*, 6 F.3d 891 (2nd Circuit 1991), the 2nd Circuit made it perfectly clear that in the context of 212(c) relief that a distinction cannot be drawn between excludable and deportable aliens with regard to that form of relief. It is also true that the same rationale was what motivated the Board of Immigration Appeals in the *Matter of Hernandez-Casillas*, Int. Dec. 3147 (Attorney General 1991). All of these cases stand for the proposition that disparate treatment under 212(c) for people in exclusion and deportation proceedings cannot be countenanced. Because I believe that I am still bound by the holding in the *Matter of Francis* and by the Board of Immigration Appeals decision in *Matter of Hernandez-Casillas*, I feel that the legislation which conflicts with this does not bind me in this instance.

Furthermore, it is unclear what the effective date of the legislation is. The legislation at issue appears under Section 440(b) of the Terrorism Prevention Act. Under 440(b) of that Act there is a provision which is probably misplaced which indicates that the effective date of the provisions shall apply to convictions entered on or after the date of the enactment of his Act. It is unclear to this Court whether this subsection (b) entitled Effective Date relates to all of subsection 440. However, it is the basic construction of statutory interpretation that whenever a statute is ambiguous, the Court must construe it in a light that is most favorable to the alien. The plain meaning of subsection (b), and it must relate to something, is that the effective date relates to convictions occurring on or after April 24, 1996. Since there is a plain meaning of the statute and since the effective date is ambiguous, I am going to construe it in

the light most favorable to the alien and conclude that the statute does not apply to this gentleman since his conviction is not on or after April 24, 1996.

Additionally, I will note that there is pending legislation in Congress which may in fact address all of these issues. Finally, I will simply note that Section 212(c) has for over 30 years provided humanitarian relief to long term residents of this country. In the spirit of the Section 212(c) waiver, I am going to construe the new provisions in the light that is most generous to the people who are affected by it. I am going to construe this new provisions in a way that is the most humanitarian given that the impetus behind Section 212(c) is to provide a second chance to long term residents of this country. Given the Congressional intent over 30 years ago in enacting a 212(c) waiver, and given the facts before this Court with regards to this gentleman, I conclude that the Anti-Terrorism Law does not apply to this gentleman and therefore, that he is not statutorily barred from receiving a grant under Section 212(c) of the Act.

Since the respondent as of October 12, 1994 had impressed all of the parties to the extent that the Government was willing to stipulate to a discretionary grant at that point in time, since I do not believe that intervening legislation has removed him from being statutorily eligible for the form of relief he requests, and since I believe that he is otherwise statutorily eligible since he has certainly been a lawful permanent resident for such longer than seven years in this country, and finally because I believe that the equities in this case clearly outweigh the one negative factor in this case, I am going to grant him the relief that he request and if I was able to do so, I would make this

decision nunc pro tunc to October 12, 1995. I am not sure that I have the power to make nunc pro tunc decision, but I certainly believe that in all fairness to this gentleman, that having concluded that he was more than eligible in the exercise of discretion in October of 1995, and the law having removed the only impediment to his statutory eligibility in March of 1996, that he is certainly deserving of the waiver on both statutory and discretionary grounds as of the date that *Aguirre* was decided in the 2nd Circuit. Accordingly, the following orders will enter:

ORDER

IT IS ORDERED that the respondent's request for a waiver under Section 212(c) of the Immigration & Nationality Act be and the same is hereby granted.

IT IS FURTHER ORDERED that these proceeding be terminated.

/s/ _____

SARAH M. BURR
United States
Immigration Judge

APPENDIX Q

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A 18 274 616 – New York Date:

In re: FRANKLIN HENDERSON

IN DEPORTATION PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Irwin J. Berowitz, Esquire
299 Broadway, Suite 1805
New York, New York 10007

ORDER

PER CURIAM. You are seeking relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(I)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano.* Interim Decision 3289 (A.G. Feb. 21, 1997). Accordingly, the appeal of the Immigration and Naturalization Service from the Immigration Judge's grant of that relief is sustained.

With respect to the respondent's contention that AEDPA violates the equal protection clause of the Constitution because the new 212(c) provisions apply only in deportation proceedings and not in exclusion proceedings. The issue of whether the AEDPA 212(c) restrictions apply in exclusion proceedings has not yet been decided. However, even assuming that section 212(c) relief is now more widely available in exclusion proceedings than in deportation, we cannot rule on the constitutionality of laws enacted by Congress. *See e.g., Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

If you conceded deportability prior to the enactment of AEDPA on April 24, 1996, in reliance on the availability of section 212(c) relief, you may have proceedings reopened for the limited purpose or contesting deportability. *See Matter of Soriano, supra.* If you wish to have proceedings reopened for this limited purpose, you must submit a signed written request to that effect directly to the Board, at the address on the attached letter, without payment of any fee. Please include a copy of this decision with any such request and mark "SORIANO REOPENING" on the request *and* on the outside of the envelope. You must serve a copy of such request on the Immigration and Naturalization Service.

FURTHER ORDER. The respondent is ordered deported to the Dominican Republic.

MARY MAGUIRE DUNN
FOR THE BOARD

APPENDIX R

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 97-2629

ENGIN YESIL, PETITIONER-APPELLEE

v.

JANET RENO, ATTORNEY GENERAL;
DORIS MEISSNER,
COMMISSIONER OF THE IMMIGRATION
AND NATURALIZATION SERVICE;
IMMIGRATION AND NATURALIZATION SERVICE;
JOHN B. Z. CAPLINGER, DISTRICT DIRECTOR;
NANCY HOOKS, OFFICER IN CHARGE,
RESPONDENTS-APPELLANTS

Docket No. 97-2599

GUILLERMO MOJICA, PETITIONER-APPELLEE

v.

JANET RENO, AS ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.,
RESPONDENTS-APPELLANTS

Present: Hon. Joseph M. McLaughlin
Hon. Guido Calabresi, *Circuit Judges*
Hon. Richard Owen, *Judge*
United States District Court for the Southern District of New York, sitting by designation

In *Yesil v. Reno*, 97-2629, and *Mojica v. Reno*, No. 97-2599, two cases before this Court as part of a consolidated appeal, the question has arisen whether John B. Caplinger, the District Director of the Immigration and Naturalization Service's Oakdale, Louisiana detention facility, who has been pleaded as a respondent in the habeas corpus petitions filed by petitioners Yesil and Mojica, falls within the personal jurisdiction of the New York courts under the New York long-arm statute, N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990).

The scope of the New York long-arm statute and its application to federal government officials in an important and controverted issue. *See e.g., Kronisch v. United States*, No. 97-6116, WL 378306, at *15 (2d Cir. July 9, 1998) (finding long-arm jurisdiction under New York law over a former Central Intelligence Agency ("CIA") official, Sidney Gottlieb, who had made several trips to the State of New York to conduct CIA business); *Kronisch v. United States*, No. 83-2458, 1997 WL 907994, at *18 (S.D.N.Y. Apr. 14, 1997), *aff'd in part on other grounds*, 1998 WL 378306 (2d Cir. July 9, 1998) (finding no long-arm jurisdiction over another CIA official, Richard Holmes, who had made similar trips).

The particular application of the New York long-arm statute to aliens (currently living in the State of New York) who are subject to deportation orders and who

are in the direct custody of an Immigration and Naturalization Service ("INS") District Director whose station is in another state is especially pressing. The question has already come up and will continue to do so with increasing regularity. *See e.g., Carvajales-Copeda v. Meissner*, 966 F. Supp. 207, 209 (S.D.N.Y. 1997) (finding under the circumstances, that the New York long-arm statute did not apply to District Director Caplinger). The frequent recurrence of the issue will result from the decisions of this circuit in *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996), in *Jean-Baptiste v. Reno*, 144 F.3d 212 (2d Cir. 1998), and in the instant case, as well as the holding of the First Circuit in *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998).

Each of these cases concluded that, under recently enacted federal statutes, the only available review of deportation orders is through 28 U.S.C. § 2241 habeas corpus petitions. Since the immediate custodian of the aliens seeking habeas is usually an INS District Director not stationed in New York, the question of the scope of New York's jurisdiction over such a director will be at issue in virtually all such cases. Given the complexity of the circumstances and the importance of this issue's resolution, we believe it essential to seek guidance from the New York Court of Appeals as to the appropriate interpretation and application of New York law in the case before us.

In the current cases, the following facts are germane to the applicability of New York's long-arm statute.

As to Yesil, the district court found that INS officials at its Oakdale facility in Louisiana were well aware of Yesil's plans to return to New York City once he was released on bond from the Oakdale facility. *See Yesil v. Reno*, 958 F. Supp. 828, 835 (S.D.N.Y. 1997). And, after

his return, INS officials in Louisiana engaged in negotiations over an increase in the bond amount via telephone conversations with Yesil's counsel, who was located in New York. Subsequently, District Director Caplinger sent two letters to New York—one to Yesil's counsel confirming the increased bond amount, and one to Yesil directing him to surrender to INS officials in Louisiana. The government also sought Yesil's surrender in the proceedings before the district court and, as a condition of the court's stay of his surrender, requested that Yesil be directed to report regularly both in person and by telephone to the INS offices in New York City. The composite of these factors led the district court to conclude that District Director Caplinger properly fell within the ambit of the New York long-arm statute. *See id.* at 835-36.

In Mojica's case, the district court found that the petitioner, who had lived in Quees, New York, ever since he came to the United States in 1972, was only transferred to the INS Oakdale detention facility in Louisiana after he had been taken into custody by the INS in its New York City offices and placed in the INS' New York detention facility. *See Mojica v. Reno*, 970 F. Supp. 130, 141-42 (E.D.N.Y. 1997). The district court also noted that Mojica's New York attorney had taken part in a telephonic bond hearing with officials at Oakdale to secure his client's release. Bond having been arranged. Mojica returned home to New York with District Director Caplinger's full knowledge. Subsequently, District Director Caplinger sought Mojica's surrender pending the resolution of his habeas petition and ordered him to return to Oakdale (using the government's New York-based attorneys to implement and enforce a deportation order against him). These actions

were collectively deemed by the district court to satisfy the New York long-arm statute. *See id.* at 166.

We cannot say with confidence whether these facts, which appear to reflect the only New York activities of District Director Caplinger in so far as these aliens are concerned, suffice to meet the requirements of New York law. Accordingly, we certify the following questions to the New York Court of Appeals:

> (1) What contacts between an Immigration and Naturalization Service District Director, whose office is located outside the State of New York and whose district does not encompass the State of New York, and an alien resididng in the State of New York, are sufficient to bring the District Director within the scope of the New York Long-arm statute, N.Y. C.P.L.R. § 302(a)(1) (MCKinney 1990)?
>
> (2) On the specific facts of each of the two above mentioned cases, does personal jurisdiction over District Director Caplinger exist in New York pursuant to N.Y. C.P.L.R. § 302(a)(1)?

It is hereby ordered that the Clerk of this Court transmit to the Clerk of the Court of Appeals of the State of New York a Certificate, as set forth below, together with a complete set of the opinions and the briefs, appendices, and record filed in this Court by the parties in the cases of *Yesil v. Reno*, No. 97-2629 and *Mojica v. Reno*, No. 97-2599. The parties are directed to bear equally such fees and costs as may be directed by the New York Court of Appeals.

The panel retains jurisdiction over both appeals so that after we receive a response from the New York

Court of Appeals we may dispose of whatever issues remain.

* * *

Certificate

The foregoing is hereby certified to the Court of Appeals of the State of New York, pursuant to § 500.17 of the Rules of the New York Court of Appeals (McKinney's 1997 Rules of Court) and § 0.27 of the Local Rules of the United States Court of Appeals for the Second Circuit, as ordered by the United States Court of Appeals for the Second Circuit.

APPENDIX S

COURT OF APPEALS FOR
THE STATE OF NEW YORK

Docket No. 97-2629

ENGIN YESIL, PETITIONER-APPELLEE

v.

JANET RENO, ATTORNEY GENERAL, ET AL

Docket No. 97-2599

GUILLERMO MOJICA, PETITIONER-APPELLEE

v.

JANET RENO, AS ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.,
APPELLANTS

Appellant Janet Reno, Attorney General of the United States appeared by Hon. Mary Jo White, United States Attorney for the Southern District of New York; respondent Engin Yesil appeared by Michael P. DiRaimondo, Esq.;

Appellant Janet Reno, Attorney General of the United States appeared by Hon. Zachary W. Carter, United States Attorney for the Eastern District of New York; respondent Guillermo Mojica appeared by Bretz & Associates, P.C., and *amici curiae* appeared by Helaine M. Barnett, Esq., The Legal Aid Society and

Lucas Guttentag, Esq., American Civil Liberties Union Foundation.

The Court, after due deliberation, orders and adjudges that acceptance of certification of questions by the United States Court of Appeals for the Second Circuit, pursuant to section 500.17 of the Rules of Practice of the New York State Court of Appeals, declined. Opinion Per Curiam. Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick and Wesley concur.

/s/ STUART M. COHEN
STUART M. COHEN,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 1, 1998.

COURT OF APPEALS FOR
THE STATE OF NEW YORK

Docket No. 97-2629

ENGIN YESIL, RESPONDENT

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
APPELLANTS

Docket No. 97-2599

GUILLIERMO MOJICA, RESPONDENT

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
APPELLANTS

[Decided: Dec. 1, 1998]

PER CURIAM:

This matter is before our court on questions certified by the United States Court of Appeals for the Second Circuit stemming from consolidated appeals to that Court. The certification relates to only two of the multiple habeas corpus proceedings in the Federal courts which involve Immigration and Naturalization Services issues.

The certified questions are as follows:

> "1. What contacts between an Immigration and Naturalization Service District Director, whose office is located outside the State of New York and whose district does not encompass the State of New York, and an alien residing in the State of New York, are sufficient to bring the District Director within the scope of the New York long-arm statute, N.Y. C.P.L.R., § 302(a)(1) (McKinney's 1990)?
>
> "2. On the specific facts of each of the two above mentioned cases [*Yesil* and *Mojica*], does personal jurisdiction over District Director Caplinger exist in New York pursuant to N.Y. C.P.L.R. § 302(a)(1)?"

We respectfully decline the certified questions, in the exercise of this Court's discretion, pursuant to New York Constitution, article VI, § 3(b)(9) and the Rules of the Court of Appeals (22 NYCRR 500.17).

Several factors bring us to that conclusion. Without implying any view on the availability of CPLR 302(a)(1) as the proffered jurisdictional predicate with respect to the individuals and circumstances involved in this case, we note our uncertainty whether the certified questions can be determinative of the underlying matters. Alternative possibilities for obtaining jurisdiction, flowing from other potential Federal and State sources, seem far-reaching. Thus, the question posed in the certification—whether jurisdiction is established under the singularly identified prong of New York's long-arm provisions—is not likely to be dispositive of the matter.

Additionally, this exclusive Federal matter—Immigration and Naturalization—presents a fact pattern that would most likely not arise in any State

court proceeding. Indeed, the Federal courts—the unique forums to handle litigation involving the INS—are in the best position to assess and rule with respect to that Agency's agents and activities in New York for jurisdictional purposes. Thus, the tendered issues are better left for definitive resolution by the Federal courts themselves (*see*, *Grabois v. Jones*, 88 NY2d 254, 255).

Lastly, we observe generally that a theoretical quality inheres in the form of the first certified question. That feature may move this valuable certification process beyond some reasonably appropriate specificity and categorization in order for the process to satisfy the "determinative question" prerequisite. Abstract or overly generalized questions might also curb this Court's ability to promulgate a precedentially prudent and definitive answer to a law question like the narrower, follow-up certified question in this very matter, that is fact and case-specific.

Accordingly, the certified questions should be respectfully declined.

Acceptance of certification of questions by the United States Court of Appeals for the Second Circuit, pursuant to section 500.17 of the Rules of Practice of the New York State Court of Appeals, declined.

Opinion Per Curiam, Chief Judge KAYE and Judges BELLACOSA, SMITH, LEVINE, CIPARICK and WESTLEY concur.

APPENDIX T

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. Effective April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be ad-

mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be ad-

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[1] Section 212(c) was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. See p. 352a, *infra*. The version set forth in the text reflects both sets of amendments. In addition, Section 304(b) of IIRIRA, 110 Stat. 3009-597, repealed Section 212(c) entirely, but Sections 306 and 309 of IIRIRA, 110 Stat. 3009-607, 3009-625, make clear that this repeal applies only to aliens placed in removal proceedings on or after April 1, 1997. See pp. 351a-353a, *infra*.

mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2) (A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. II 1996), provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

7. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—

(1) in paragraph (8), by adding "and" at the end;

(2) in paragraph (9), by striking "; and" at the end and inserting a period; and

(3) by striking paragraph (10).

8. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

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[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA. See p. 352a, *infra*.

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

"(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

9. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

> REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

10. Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996),[3] provides in pertinent part:

> **APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242).**
>
> * * * * *
>
> (b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 1105a) is repealed.
>
> (c) EFFECTIVE DATE.—
>
> (1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

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[3] Public Law No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) made certain technical amendments to Sections 306 and 309 of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, 3009-625, effective as if enacted on the original date of enactment of IIRIRA.

* * * * *

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)".

11. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and

> Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

12. Section 2241 of Title 28, United States Code, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

APPENDIX U

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Interim Decision #3289

In re Bartolome Jhonny Soriano, Respondent

File A39 186 067 - Napanoch

Decided June 27, 1996

Before: Board En Banc: SCHMIDT, Chairman; HEILMAN, HOLMES, VILLAGELIU, MATHON, and GUENDELSBERGER, Board Members. Concurring and Dissenting Opinion: ROSENBERG, Board Member. Dissenting Opinion: VACCA, Board Member, joined by DUNNE, Vice Chairman; HURWITZ, FILPPU, and COLE, Board Members.

HEILMAN, Board Member:

In a decision dated October 12, 1995, an Immigration Judge found the respondent deportable as charged, denied his application for a waiver of inadmissibility pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), and ordered him deported from the United States to the Dominican Republic. The respondent appealed from that decision

on October 23, 1995. Subsequent to the respondent's appeal, Congress amended section 212(c) of the Act, and the Immigration and Naturalization Service has now filed a supplemental brief in response to the respondent's argument, asserting that the recent legislative amendments preclude the respondent from demonstrating his continuing eligibility for section 212(c) relief.[4] Thus, we are faced with the issue regarding the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 ("AEDPA"). We find the respondent eligible for section 212(c) relief, but will deny his appeal as a matter of discretion.

I. PROCEDURAL HISTORY

The respondent is a native and citizen of the Dominican Republic. He entered the United States on March 28, 1985, as a lawful permanent resident. On May 20, 1992, the respondent was convicted under the law of the State of New York of the offense of attempted criminal sale of a controlled substance. Based on this conviction, the Service initiated deportation proceedings against the respondent with the issuance of an Order to Show Cause and Notice of Hearing (Form I-221) dated June 3, 1994. On April 28, 1995, the respondent filed an Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191) pursuant to section 212(c) of the Act. By order dated October 12, 1995, the Immigration Judge found that the respondent was eligible for relief under section 212(c) of the Act, but denied that application in the exercise of

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[4] We acknowledge the contribution of amici in the briefing of this issue to the Board.

discretion. On appeal, the respondent argues that the Immigration Judge erred in the exercise of that discretion.

II. APPLICABLE LAW

Prior to considering the respondent's appeal of the Immigration Judge's discretionary determination, this Board must first address the Service's contention that the recent amendments to section 212(c) of the Act statutorily bar the Board from considering the merits of the respondent's appeal from his section 212(c) application. We note initially that the respondent was clearly eligible for such relief under the law in effect at the time the Immigration Judge rendered his decision.[5]

However, during the pendency of the respondent's appeal from the Immigration Judge's discretionary denial of his application, Congress amended section 212(c) of the Act to read as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and

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[5] Until April 24, 1996, section 212(c) of the Act read as follows:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

> not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). *This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).*

Section 440(d) of the AEDPA, 110 Stat. at 1277 (emphasis added).

The respondent, deportable by reason of having committed an offense covered by sections 241(a)(2)(A)(iii) and (B) of the Act, falls within the last sentence of the AEDPA amendment. Thus, we must decide whether Congress intended the respondent to remain eligible for section 212(c) relief after April 24, 1996.

III. EFFECTIVE DATE

Congress did not incorporate an express provision regarding the effective date of section 440(d) of the AEDPA. Initially, then, we must discern the date on which this section of law became effective, and, if effective immediately, whether it applies to those aliens already in proceedings as of April 24, 1996. If it does so apply to those aliens in proceedings, we must further

determine whether the amendment applies to those aliens who filed their section 212(c) applications by April 24, 1996. In resolving these issues of the AEDPA's temporal applicability, we first look to the language of the statute itself. We begin by noting that the paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole. *See Matter of Grinberg*, 20 I&N Dec. 911 (BIA 1994) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (stating that in ascertaining the "plain meaning" of a statute, one "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

A. SECTION 440(D) AND PENDING PROCEEDINGS

Initially, we find persuasive evidence to conclude that Congress intended section 440(d) to apply immediately, regardless of whether the Service had placed an alien in proceedings by April 24, 1996. Both general statutory construction and an examination of Congress' inclusion of other effective dates in the AEDPA lead us to this result. General rules of statutory construction hold that the lack of an effective date for legislation indicates that the law should be effective on the date of passage. *See generally* 2 C. Sands, *Sutherland Statutory Construction* § 33.08 (4th ed. 1973). We find no obstacle to the application of this rule in the language of the AEDPA; rather, we find such an interpretation buttressed by Congress' decision to expressly delay the effective date of other subsections of the AEDPA. For example, in section 414(b) of the AEDPA, 110 Stat. at 1270, Congress expressly provided that this amendment "shall take effect on the first day of the first

month beginning more than 180 days after the date of the enactment of [the AEDPA]." Similarly, in section 442 of the AEDPA, 110 Stat. at 1280, Congress amended section 242A(b) of the Act with regard to certain procedural aspects of deportation hearings and stated, in subsection 442(d), that those amendments "shall apply to all aliens against whom deportation proceedings are initiated after the date of the enactment of [the AEDPA]." The absence of similar language in section 440(d) supports the conclusion that Congress intended section 440(d) of the AEDPA to apply to aliens already in proceedings on April 24, 1996. These express declarations in other subsections of the AEDPA, in conjunction with Congress' silence in section 440(d) of the AEDPA, lead us to conclude that section 440(d) was effective immediately upon enactment and was not limited in applicability to those aliens whose proceedings were initiated after that date.

B. PENDING APPLICATIONS

However, this finding that section 440(d) of the AEDPA was effective immediately and not limited in application to those aliens brought into proceedings after April 24, 1996, does not finally resolve whether this respondent is barred from section 212(c) relief. There remains a subcategory of aliens, including the respondent, who already had applications for section 212(c) relief pending on April 24, 1996. Such aliens include those deportable aliens awaiting their section 212(c) merits hearings, as well as those aliens who have appealed the Immigration Judge's denial of their applications, and those who, having received a grant of section 212(c) relief, are subject to a Service appeal of the Immigration Judge's decision. In determining con-

gressional intent from the language and design of the AEDPA as a whole, we do not find that Congress' silence regarding the effective date of section 440(d) reflects an intent for the amendment to bar pending applications for section 212(c) waivers. In reaching this conclusion, we note that in section 413 of the AEDPA, which bars alien terrorists from most forms of relief from deportation, Congress expressly indicated that those bars to relief "shall take effect on the date of enactment of the AEDPA and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date." *See* section 413(g) of the AEDPA, 110 Stat. at 1269-70.

Another basic rule of statutory construction instructs that no provision of law should be so construed as to render a word or clause surplusage. See *Kungys v. United States*, 485 U.S. 759 (1988); *Colautti v. Franklin*, 439 U.S. 379 (1979). By adding the effective date found at section 413(g) of the AEDPA, Congress expressed its clear intent that section 413 of the AEDPA apply specifically to pending applications of alien terrorists. To construe this same intent by Congress' silence in section 440(d) of the AEDPA would require us to conclude that the "before, on, or after" language of section 413(g) of the AEDPA is unnecessary and irrelevant to whether that section applies to applications for asylum pending before the AEDPA's enactment. This we decline to conclude. Rather, we interpret Congress' omission of the "before, on, or after" language in section 440(d) to indicate its intent that aliens with applications pending on April 24, 1996, should not be statutorily

barred from section 212(c) relief by operation of the AEDPA.[6]

This conclusion is consistent with the approach to statutory interpretation set forth by the United States Supreme Court in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In that case, the Supreme Court observed that when deciding whether changes in law should be applied to pending controversies in the absence of express congressional directive, "settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, *supra*, at 1497. By applying section 440(d) of the AEDPA to only those applications for section 212(c) relief filed on or after the date of the enactment of the AEDPA, the unique expectations of aliens whose applications for section 212(c) relief were pending prior to the enactment of the AEDPA are not disrupted. Such aliens demonstrated, with the filing of their pre-AEDPA applications, their expectation that although they were deportable under various provis-

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[6] Similarly, we note that silence cannot reasonably be interpreted as evidencing a congressional intent to apply the new limitations in section 212(c) only to those aliens whose *convictions* for the relevant offenses occurred on or after the date of enactment of the AEDPA because Congress expressly stated that result in the AEDPA when such was its intent. *See* section 440(f) of the AEDPA, 110 Stat. at 1278 (stating that the amendments to the aggravated felony definition "apply to convictions entered on or after the date of enactment"). Moreover, as regards the issue of "settled expectations" discussed below, both the Board and the courts have noted that aliens cannot reasonably argue "'that they somehow relied on the availability of a discretionary waiver of deportation when choosing to engage in [criminal] activity.'" *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 964 (BIA 1995) (quoting *DeOsorio v. United States INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

ions of the Act, they would be able to present evidence of favorable social and humane considerations that might countervail evidence of their undesirability as lawful permanent residents. *See generally Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The interpretative approach enunciated by the Supreme Court in *Landgraf* supports the conclusion that Congress did not intend by its silence to disrupt the expectations of those aliens whose applications for section 212(c) relief were pending on April 24, 1996.

Moreover, this conclusion is consistent with the approach adopted by Congress with its amendment of section 212(c) of the Act by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in which a statutory 5-year aggravated felony bar to that relief was made applicable to aliens who applied after the date of the enactment of that 1990 amendment. *See Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

C. APPLICABILITY TO RESPONDENT'S SECTION 212(C) REQUEST

The respondent applied for section 212(c) relief on April 28, 1995, prior to the April 24, 1996, enactment of the AEDPA. Accordingly, the bar to section 212(c) relief added by the amendment of that section by section 440(d) of the AEDPA does not apply to the respondent's application for relief. There is no question that the respondent is eligible for section 212(c) relief by the version of that section that was in effect prior to its amendment by section 440(d) of the AEDPA. That is, the respondent is not an alien convicted of an aggravated felony who served for such felony a term of imprisonment of at least 5 years. Thus, we find the

respondent eligible for relief under section 212(c) of the Act, and we proceed to the question of whether he merits that relief in the exercise of discretion.

III. DISCRETION

Notwithstanding the respondent's continued eligibility for a waiver of inadmissibility, we ultimately disagree with his appellate argument that the Immigration Judge erred in finding that he did not warrant a discretionary waiver pursuant to section 212(c) of the Act. As the Immigration Judge correctly noted, the respondent's attempted criminal sale of cocaine, in addition to his three other drug-related felonies, require a demonstration of outstanding or unusual equities before the respondent may receive a section 212(c) waiver of inadmissibility. *See Matter of Marin*, *supra*; *cf. Matter of Burbano*, 20 I&N Dec. 872, 879 (BIA 1994). We agree with the Immigration Judge that the respondent has failed to demonstrate such equities so that he may overcome his serious and recent drug trafficking crimes.

The respondent testified at the hearing that he has various family ties in the United States, including his mother, two siblings, and his United States citizen son. Moreover, the respondent explained that his son lives with his ex-wife, and that his family assists them financially. The respondent's mother and sister also testified on his behalf, and while we find it noteworthy that the respondent's family members attended the hearing, we do not find that this familial support alone rises to the level of outstanding or unusual. The respondent maintains various family ties in the Dominican Republic, including three daughters and four siblings. He arrived

in the United States only 10 years ago as a 25-year-old adult, and his employment during his residence in the United States has been sporadic.

Regarding his rehabilitative efforts, we note that the respondent testified that he has participated in a drug rehabilitation program while he has been incarcerated, and that after 18 years of drug use, he has maintained a drug-free lifestyle while in prison. Moreover, he testified that he has also received his GED while incarcerated, and he has recently strengthened his religious beliefs. We agree with the Immigration Judge that the respondent has demonstrated a willingness to continue his progress towards a drug-free and crime-free lifestyle and has taken steps towards rehabilitation. *See Matter of Arreguin*, Interim Decision 3247 (BIA 1995). However, considering these factors in conjunction with his family ties here and abroad, and his relatively short period of residence in the United States, we can not find that the respondent has demonstrated sufficient equities to overcome his four recent drug trafficking felonies. *Cf. Matter of Burbano*, *supra*. Accordingly, we will dismiss the respondent's appeal.

ORDER: The appeal is dismissed.

CONCURRING AND DISSENTING OPINION: Lory D. Rosenberg, Board Member

I respectfully concur in part and dissent in part.

Our decision today seeks to resolve the ambiguity presented by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), which amends the category of otherwise eligible lawful permanent resident aliens precluded from a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)(1994).

The text of this section, as set forth by the majority, contains no express provision specifying an effective date for this amendment. The majority opinion properly recognizes that the fact that the AEDPA became law on April 24, 1996, is not dispositive of the effect of section 440(d) on an alien who "is deportable" on the grounds of deportability designated in that section.[7]

In essence, we hold that two related factors, traditional principles of statutory construction and Supreme

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[7] This "ill-advised" provision of AEDPA is less than artfully drawn, having been enacted at the 11th hour as part of a bill ostensibly addressing the deportation of terrorists, not the deportation of "long-term legal residents." *See* President's Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 717 (Apr. 29, 1996). While section 440(d) refers to those "deportable by reason of having committed any criminal offense covered" by specified sections of the Immigration and Nationality Act, the only aliens so deportable are aliens who actually have been convicted of such offenses.

Court law interpreting the application of new statutes to pre-existing circumstances, must control the reach of this provision of the AEDPA. *See Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994). In the context of the appeal before us, it is necessary only to find, as the majority does, that the amendment does not apply to pending applications already filed by aliens in deportation proceedings. Thus, the respondent, who is deportable by reason of a conviction for a covered offense, remains eligible to have his pending application for a waiver of deportability under section 212(c) determined. For purposes of the scenario presented in this appeal, I concur.

I. THE SILENCE OF THE STATUTE

The silence of the statute with regard to its impact upon conduct and other events which already have taken place is significant. Nothing in the text or the legislative history of the AEDPA indicates that section 440(d) should be applied retroactively to pending cases or pre-amendment circumstances, or that this silence was due to an "accident of draftsmanship." *INS v. Phinpathya*, 464 U.S. 183, 191 (1984). By contrast, as the majority discusses, other sections of the AEDPA expressly address the effect of the particular provision on circumstances existing prior to its enactment. *See, e.g.*, section 413(g) of the AEDPA, 110 Stat. at 1269-70.

As recognized consistently by the Supreme Court, retroactivity is not favored in the law. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988). A presumption against retroactivity generally is consistent with legislative and public expectations as a safeguard against unfairness. *Landgraf v. USI Film*

Products, *supra*, at 1501. This principle dates back to English common law, and even to Roman law. *See*, *e.g.*, *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806); *Dash v. Van Kleeck*, 7 Johns. 477, 502-03, 505 (N.Y. 1811) (the prince may enact a retrospective law as long as it is done expressly).[8]

In *Landgraf v. USI Film Products*, *supra*, the Supreme Court restated the principle that a statute shall not be given retroactive effect unless expressly provided by Congress. Specifically, the Supreme Court cautioned that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct which occurred prior to that date." *Id.* at 1493.

To the extent that the majority decision is understood to mean either that the language in the statute as a whole is reconciled or that the *Landgraf* principles, discussed below, are properly observed only by finding that aliens who have *filed applications* for section 212(c) waivers by April 24, 1996, are not subject to section 440(d), I must differ. I write separately because I believe this Board's decision requires clarification on these points.

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[8] *See Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996) (discussing the specific language in the AEDPA relating to restrictions upon release from custody, and concluding that any interpretation of the Act applying it to offenses committed before April 24, 1996, (and convictions obtained before that date) would raise serious constitutional issues).

II. STATUTORY CONSTRUCTION AND RETROACTIVITY

As the agency implementing the statute, we recognize that a statutory construct involving silence in one provision but not another requires us to give effect to each provision. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (holding that the Board may not blur the distinctions between two related but separate statutory standards or reduce them into one); *Matter of Hou*, 20 I&N Dec. 513 (BIA 1992) (recognizing that Congress' use of different terminology in two sections of the statute requires the Board to give each independent effect).

In fact, this is precisely what was done by this Board in *Matter of A-A-*, 20 I&N Dec. 506 (BIA 1992), where we looked to the statutory language in various sections of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in order to determine the applicability of the amendment of section 212(c) contained in that enactment. Although the section was silent as to its applicability to prior convictions, the express language of the statute made that amendment applicable to pending applications.[9]

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[9] I note that our decision in *Matter of A-A-*, *supra*, also involved a situation, not present here, in which a retroactive application was necessary in order for the law to be effective. *See also Matter of Gomez-Giraldo*, 20 I&N Dec. 957 (BIA 1995) (finding 5-year incarceration bar would be delayed for 5 years if not applied to prior convictions).

Coupled with the principle enunciated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, at 1497, that when new provisions attach new legal consequences to prior events, "settled expectations should not be lightly disrupted" (unless Congress expressly states such an intent), these precepts militate in favor of adjudicating the respondent's waiver application according to the prior law. For the sake of brevity, I will refer to these two considerations—the requirement that we must interpret silence in a provision so as to give effect to the whole statute, and the doctrine of settled expectations as foreclosing the retroactive application of a new or amended statute to prior conduct—as the "*Landgraf* principles."

Semantic sparring over whether a new provision can be retroactive because it is being applied to an adjudication we are conducting in the present is not a useful exercise. Nonetheless, the dissent focuses on the application, which is a continuing one, rather than on past events and expectations which are settled, and avoids addressing the issue. The issue is whether the new provision *operates* retroactively. That is, does it affect the settled expectations of the parties, in this case, the respondent, as best described in the *Landgraf* principles.[10] Moreover, this Board previously has acknowledged that eliminating section 212(c) relief *does* have

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[10] The predisposition against a retroactive construction of laws which operate to affect prior conduct is the principle that an individual should be able to act with reasonable certainty of the legal consequences. *See Chew Heong v. United States*, 112 U.S. 536, 559 (1884); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

retroactive effect. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995); *Matter of A-A-*, *supra*.

In this instance, even though the determination of eligibility for a waiver under section 212(c) may be prospective, the restriction in the amended provision has a retroactive operation or effect as it constitutes a new legal consequence which attaches, at a minimum, to any lawful permanent resident already subject to an Order To Show Cause or otherwise in the agency "pipeline." It is arguable that the legal consequences attach, in fact, to the conviction itself and even to the commission of the offense. Thus, as I discuss below, I believe that to find the amended provision applicable to all applications, as does the dissent, or only to already-filed and pending applications, as does the majority, falls short of the proper observance of the *Landgraf* principles.

A. *Landgraf* Principles and Board Precedent

Previously, the Board held that where new statutory provisions affecting eligibility for relief from deportation come into effect during the pendency of a deportation hearing or an administrative appeal to this Board, and there exists no statutory directive to the contrary, the new statutory provisions shall be applied to the application for relief before us, and the application may be denied on the basis of the statutory amendment. *Cf. Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993). Although the dissent clings to this position, it simply is not applicable here.

Since our decision in *Matter of U-M-*, *supra*, the United States Supreme Court issued its decision in

Landgraf v. USI Film Products, *supra*, in which it comprehensively discussed the issue of the application of statutory amendments to pending controversies. As I understand the dissent to assert that a silent statute is not only effective when signed by the President, but applies to all prior or pending events or conduct, I note that in *Landgraf*, the Supreme Court reconciled the apparent conflict between the presumption that "a court must apply the law in effect at the time it renders its decision," and the presumption against retroactivity. *Landgraf v. USI Film Products*, *supra*, at 1486-87 (citing *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974)).

In fact, in *Matter of Gomez-Giraldo*, *supra*, in which we last visited the impact of the Supreme Court's reasoning in *Landgraf v. USI Film Products*, *supra*, we held that the aggravated felony bar added to section 212(c) of the Act by a previous amendment implicated none of the concerns enunciated in *Landgraf*. We reasoned that, because that amendment, by its express terms, applied only to those applications for relief made on or after the effective date of the amendment, it would not disturb a lawful permanent resident's settled expectations that he or she could apply for and be granted a waiver under section 212(c). *Matter of Gomez-Giraldo*, *supra*, at 963-64. Our holding today, relating to an amendment with no express language, is entirely consistent with that decision and the reasoning underlying it.

B. *Landgraf* Principles and Factual Scenarios Under Section 440(d)

In *Landgraf v. USI Film Products*, *supra*, the Supreme Court set out a basic test to determine whether a statute would operate "retroactively" or "retrospectively" if applied to a case pending at the time of the statute's enactment. The Court stated that the question a body must ask is "whether the provision attaches new legal consequences to events completed before its enactment." *Id.* at 1499.

The first question presented is, which cases, if any, in the agency "pipeline" are affected? The majority limits its determination to persons who have already filed applications for relief under section 212(c). There remains an open question, however, whether the amendment applies to all potential candidates for the waiver already "in the pipeline."

Arguably, the "pipeline" could include various categories of individuals who are alleged to be deportable under the pertinent sections of the statute, and who are otherwise eligible for and require the grant of a waiver under section 212(c) in order not to be deported. Assuming the main, more comprehensive group to be putative candidates who have been identified by the Immigration and Naturalization Service as deportable aliens is consistent with the *Landgraf* principles.

This could encompass aliens who are the subject of a "detainer" placed against them during their incarceration for a criminal offense as the result of a request by the Service; it could include those served with an Order to Show Cause issued by the Service; and it could

include those subject to an Order to Show Cause against whom deportation proceedings have commenced as defined under the regulations. It could include those who have filed an application for a waiver under section 212(c) in proceedings before an Immigration Judge; those who are seeking to reopen to apply for 212(c) relief; and those who have received an order from an Immigration Judge from which an appeal has been taken to the Board and/or to the circuit courts of appeal.

In particular, this Board only recently recognized decisions of the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits, which hold that the statutory language of section 212(c) makes plain that an alien may establish lawful domicile while in a status other than that of a permanent resident. *See Matter of Cazares*, Interim Decision 3262 (BIA 1996) (holding that a temporary resident under section 245A of the Act may accrue time towards 7-year lawful domicile requirement of section 212(c)). Further, the Fifth Circuit held specifically that temporary residents under both the legalization (section 245A) and special agricultural worker ("SAW") (section 210) provisions may accrue lawful domicile while in that status. *See White v. INS*, 75 F.3d 213 (5th Cir. 1996).

This Board has remanded appeals from decisions arising in those circuits to allow applications for section 212(c) to be filed and heard in the first instance or for a hearing on the merits when such was pretermitted by the Immigration Judge. The majority overlooks these cases; while not explicitly implicated in our decision today, the truncated interpretation of the majority leaves unresolved hundreds of cases of individuals who

we found to have been entitled to consideration at least under controlling circuit law, but whose applications were unlawfully pretermitted and foreclosed. In my view, such applicants are entitled to the opportunity to seek relief from deportation under section 212(c) whether or not they have a pending application on file. *See Snajder v. INS*, 29 F.3d 1203 (7th Cir. 1994).

The next question is whether the amendment applies to aliens convicted of any offense which would render them subject to deportation proceedings on charges referenced in section 212(c), as amended, and ineligible to apply for or be granted a waiver under that section. In the first published opinion on a provision of the AEDPA, the District Court of Massachusetts, construing section 440(c), posited that it was untenable that Congress could have intended that the terms of the provision apply other than to persons convicted on or after the April 24, 1996 effective date. *Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996). Section 440(c) refers to custody requirements applicable to the exact same categories of aliens affected by the operation of section 440(d).

One difference between the language in section 440(c) and that in section 440(d) is that the plain language of section 440(c) amends section 242(a)(2) of the Act, which mandates the Attorney General to take into custody any alien "*convicted of* [the same offenses specified in amended section 212(c)] . . . upon release of the alien from incarceration." (Emphasis added.) By contrast, the language of section 440(d) amends section 212(c) to read that the provision "shall not apply to an alien who *is deportable* by reason of having committed an offense." (Emphasis added.)

As the majority states, silence cannot reasonably be interpreted as supporting a "settled expectation" of being able to engage in criminal activity without consequences. However, I part ways with the majority when they declare that individuals may not have "settled expectations" with regard to an opportunity to seek a section 212(c) waiver that affects a plea of guilty or other trial or appellate choices.

III. LANDGRAF PRINCIPLES AND MANIFEST INJUSTICE

In the absence of specific language, the reach of the statute depends upon settled expectations. This doctrine is different from, but enhanced by, that of "manifest injustice."

The human consequences of the AEDPA which are implicated by the legal question before us are compelling. I believe this is especially important to note in light of the fact that our decision today denies the requested relief from deportation. Waivers under section 212(c) are not easily obtained; to the contrary, they are perhaps the most difficult and hard won of any forms of discretionary relief over which we exercise our jurisdiction. At stake is an alien's ability to remain in this country as a permanent resident, which is determined by balancing the good of society as a whole against the individual social and humane considerations that may pertain to any one case. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

Such waiver applications are individual and fact bound, and they are properly left to the exercise of discretion by Immigration Judges in individual cases,

subject to the de novo review authority of this Board. While applicants for section 212(c) waivers share the adverse factor of having been convicted of a criminal or other immigration offense or offenses which renders them subject to deportation, they are as individual as humans can be and as human experience allows.

Applicants for waivers under section 212(c), until now, have included persons convicted of a single, possibly victimless or nonviolent crime or crimes over a discrete period of their stay in the United States, who have acknowledged their wrongdoing and changed their behavior. They include individuals who came to this country with their families as infants; adults who have neither spoken their native language nor been in their native country since childhood; fathers, mothers, and single parents of United States citizen children; businessmen and women who employ United States citizen workers in legitimate occupations; caretakers of elderly United States citizen parents; victims of domestic violence; and refugees. While they are not free of responsibility for their mistakes, they have paid, often dearly, for their transgressions in the criminal justice system, and they cannot all be said to unilaterally present a menace or threat to our society such that deportation is warranted.

I find compelling policy and practical reasons to go beyond such a limited interpretation as the one the majority proposes in this case. All of these people, and no doubt many others, had settled expectations to which they conformed their conduct. *Landgraf v. USA Film Products*, *supra*, at 1497, instructs that those "settled expectations should not be lightly disrupted." "Retroactive application of laws is undesirable where

advance notice of the change in the law would motivate a change in an individual's behavior or conduct." *Griffon v. United States Dept. of Health and Human Services*, 802 F.2d 146, 153 (5th Cir. 1986) (citing *Alexander v. Robinson*, 756 F.2d 1153 (5th Cir. 1985)).

Statutes may not be applied retroactively where doing so would result in manifest injustice to those affected. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). Here, manifest injustice would result to a significant number of legal residents, because, while otherwise eligible, their right to apply for a section 212(c) waiver will have been infringed. Moreover, I note the inevitable disparity in treatment accorded different individuals that would result, because otherwise eligible legal residents requiring a waiver have no control over when proceedings are commenced or how quickly or in what order hearings and appeals are set or adjudicated. *See Dion v. Secretary of Health and Human Services*, 823 F.2d 669, 672 (1st Cir. 1987) (finding a retroactive application inappropriate where a disparity among applicants would result).

Further, although no legal resident has the absolute right to be granted section 212(c) relief, eligible residents do have a vested right to apply and be considered for such relief. *See, e.g., Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Snajder v. INS*, *supra*, at 1207-08; *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993). For example, a respondent's counsel might have been ineffective in failing to file a section 212(c) application on behalf of an otherwise eligible respondent. *Rabiu v. INS*, *supra*. The Service may have violated a regulation denying the respondent the right to counsel. *Snajder v. INS*, *supra*; *Batanic v. INS*, *supra*. The

Immigration Judge might have wrongfully denied the respondent's motion for a change in venue that prejudiced his or her rights to a fair hearing. *Campos v. Nail*, 43 F.3d 1285 (9th Cir. 1994). The Immigration Judge might have failed to notify the respondent of relief for which he or she was apparently eligible. *Bui v. INS*, 76 F.3d 268 (9th Cir. 1996).

In any of these cases, I believe due process and fundamental fairness would dictate that we accept the case for consideration of section 212(c) relief, nunc pro tunc. Even while acknowledging the absence of statutory authority to do so, this Board has long granted nunc pro tunc relief to cure various defects in proceedings, if such treatment would dispose of a case. *Matter of Garcia*, Interim Decision 3268 (BIA 1996); *see also Matter of Lok*, 18 I&N Dec. 101, 107 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982).

IV. CONCLUSION

I would find that section 440(d) of the AEDPA operates retroactively if applied not only to pending section 212(c) applications, but to other prior events. It would attach a new legal consequence to both a pre-amendment charge or finding of deportability under most of the provisions found at section 241(a)(2) of the Act. Prior to the amendment, a person entering into plea agreements or found deportable under those sections who were otherwise eligible could rely upon an opportunity to present evidence of social and humane considerations to countervail evidence of their undesirability as a permanent resident in order to demonstrate that the granting of section 212(c) relief appeared to be in the best interest of the United States. *Matter of*

Marin, *supra*, at 584. To upset those settled expectations by retroactively applying section 440(d) of the AEDPA, without the express directive of Congress requiring such an application, attaches a new legal consequence to conduct and events already completed by April 24, 1996. It would require us to disregard the concerns articulated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, and, in my view, would contravene both practical considerations and fundamental fairness.

DISSENTING OPINION:

Fred W. Vacca, Board Member, in which Mary Maguire Dunne, Vice Chairman, Gerald S. Hurwitz, Lauri S. Filppu, and Patricia A. Cole, Board Members, joined.

I respectfully dissent.

As stated by the majority, the issue before us is to determine the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), and if effective on enactment, to decide which aliens who were eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), are affected by the amendment. I agree with the majority's finding that general principles of statutory construction lead directly to the conclusion that the amendment took effect on the date of enactment, absent the inclusion of an alternative effective date. Therefore section 440(d) of the AEDPA applies immediately to aliens in proceedings. *See Matter of U-M-*, 20 I&N Dec. 327, 332 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993).

However, I part company with the remainder of the analysis employed by the majority with respect to the applicability of section 440(d) to pending applications for section 212(c) relief. I do not view the fact that Congress specifically barred pending applications for relief by alien terrorists, as set forth in section 413(g) of the AEDPA, 110 Stat. at 1269-70, to in any way dictate or even guide us in determining whether section 440(d) applies to pending section 212(c) applications. For com-

parison purposes, I cannot determine the relevant effective date from looking at the four corners of the statute to the extent that Congress employed a wide variety of effective dates throughout the AEDPA, including prospective dates. I conclude that we are compelled to apply the provisions of section 440(d) to all pending section 212(c) applications.

This Board has consistently held that an application for relief from deportation is an ongoing application. *Matter of U-M-*, *supra*, at 332. The law that applies to the application is the law that exists at the time the final administrative decision is made. *Ziffrin v. United States*, 318 U.S. 73 (1943); *Matter of U-M-*, *supra*. A final administrative decision is made when the Board renders its decision in a case on appeal or certification, or where no appeal is taken, the right to appeal is waived, or the time allotted for appeal has expired. *See Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir.1982); 8 C.F.R. §§ 3.1(d)(2), 3.39 (1995).

This Board has also held that an application for section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States. *Matter of A-A-*, 20 I&N Dec. 492, 502 n.22 (BIA 1992). Thus, in addition to qualifying as a person whose ongoing application for relief is subject to the existing law while under administrative review, the section 212(c) applicant also stands as an individual seeking entry to the United States, and his admissibility is determined on the basis of the facts and the law that exist at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

Furthermore, like the majority, I find additional support for my position in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In *Landgraf* the Supreme Court stated:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.

Id. at 1501.

Prospective relief has been defined by the Supreme Court as relief that operates in futuro, such as injunctive relief. *See American Steel Foundaries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). This is in contrast to relief that operates "retroactively," such as damages and restitution. *See Hutto v. Finney*, 437 U.S. 678, 695 n. 24 (1978).

The Supreme Court has specifically held that statutory provisions that alter or affect forms of prospective relief are to be given effect upon the effective date of the legislation and should be applied to pending suits. *American Steel Foundries v. Tri-City Central Trades Council, supra*, at 201; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921); *see also Hall v. Beals*, 396 U.S. 45 (1969). The Court has further held that parties to an action do not have vested rights to prior judgments conferring forms of prospective relief while their cases remain subject to appellate review. *See American Steel Foundries v. Tri-City Central Trades Council, supra*; *Duplex Co. v. Deering, supra*; *see also Raferty V. Smith Bell & Co.*, 257 U.S. 226 (1921).

Therefore, the ultimate right to prospective relief must be determined at the time of final administrative or judicial review.

Like injunctive relief, relief from deportation under section 212(c) of the Act is prospective in nature. *See Matter of K-L-*, 20 I&N Dec. 654, 658 (BIA 1993), *aff'd*, *Lee v. INS*, 12 F.3d 1102 (8th Cir. 1993) (referring to section 212(c) relief as prospective). Under the Immigration and Nationality Act, an alien's right to benefit from a waiver under section 212(c) can only be determined at the time of a hearing and upon a finding of excludability or deportability. Relief under section 212(c) therefore operates in futuro and does not nullify the fact that the alien, prior to applying for the waiver, was either excludable or deportable. Convictions alleged to be grounds for excludability or deportability do not disappear from an alien's record for immigration purposes upon a grant of relief under section 212(c). *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). Hence, section 440(d) of the AEDPA amends a prospective form of relief and accordingly should be applied to all cases before this Board that remain subject to our appellate review. *See Landgraf v. USI Film Products*, *supra*; *American Steel Foundaries v. Tri-City Central Trades Council*, *supra*.

In light of the above case law, I am hard pressed to identify a basis for not applying section 440(d) of the AEDPA to all section 212(c) applications that are pending adjudication or review. The weight of authority clearly requires the Board to apply the new law, as the law was changed before a final administrative decision had been rendered. Furthermore, applying the amended section 212(c) provisions to pending appli-

cations does not offend any of the concerns underlying the retroactive operation of new statutes. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

Due to the nature of an application for a waiver under section 212(c), which is a continuous application until the conclusion of final administrative action, the effect of applying section 440(d) to pending applications is not retroactive. The only expectation an alien seeking to apply for section 212(c) waiver can rely on is that his application will be considered according to the law and facts as they stand at the time of final administrative review. In this context, it has long been true that an alien whose circumstances improve through the acquisition of an additional equity can move the Board to remand a pending matter for reconsideration of the discretionary aspect of his section 212(c) application in light of the new evidence. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

Finally, I am concerned with the majority's preferred choice of the date of filing the section 212(c) application as being determinative of which applications can be evaluated under the pre-AEDPA statutory provisions. This effective date is not contained elsewhere in the AEDPA. Moreover, there are numerous other dates that could be selected, e.g., the date the crime giving rise to the ground of deportability occurred, the date of issuance of the Order to Show Cause, the date on which a finding of deportability was rendered, and the date of filing the application.

The majority claims support for its selected effective date in the Supreme Court's analysis in *Landgraf v. USI Film Products*, *supra*. However, under *Landgraf*,

Title IV of AEDPA, which governs "Criminal Alien Procedural Improvements" (110 Stat. 1273), and, specifically, in Section 440 of AEDPA, which governs "Criminal Alien Removal" (110 Stat. 1276). There, Congress expressly provided that Section 440(e) (immediately adjacent to Section 440(d), at issue here)—which expanded the definition of "aggravated felony," conviction of which renders an alien deportable—was to be applied only to *future* immigration cases. See AEDPA § 440(f) (providing that Section 440(e) "shall apply to convictions entered on or after the date of the enactment of this Act," with an exception for AEDPA Section 440(e)(3), referring to convictions for alien smuggling, which was made applicable as if enacted in 1994), 110 Stat. 1278. The most obvious inference to be drawn from that express prospective-only directive is that Section 440(d), which also makes deportation consequences turn on an alien's conviction for a crime but contains no such prospective-only directive, should be applied to pending cases.

Respondents attempt (Br. in Opp. 25) to diminish the impact of Section 440(f) by arguing that it is not a "pure prospectivity provision[.]" In a limited sense Section 440(f) does not make Section 440(e) purely prospective, for under Sections 440(e) and (f) an alien may be deported as an aggravated felon even if his crime was committed before enactment of AEDPA, as long as the conviction was entered after AEDPA's enactment. The principal thrust of Section 440(f), however, is to make clear that Section 440(e) does not make an alien deportable based on his *pre-existing* conviction for a crime newly defined as an aggravated felony. The INA makes an alien's deportability turn on his *conviction* for an aggravated felony, not his *commission* of such a crime. See 8 U.S.C. 1251(a)(2)(A)(iii) (1994); 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. III 1997). Accordingly, Section 440(e) of AEDPA was *expressly* made to apply prospectively based on the event that renders an alien deportable—a criminal conviction for

an aggravated felony—which places it in sharp contrast to Section 440(d) of AEDPA. See also 98-835 Pet. 26-27 (discussing two other prospective-only provisions in AEDPA's criminal alien subtitle that reinforce the conclusion that Section 440(d), which contains no such provision, applies to pending cases).

Respondents argue further (Br. in Opp. 26-28) that, even if the lower court's inferences from the statutory structure and text about the temporal scope of Section 440(d) were unwarranted, it would have been justified in applying the presumption against retroactive applications of federal civil statutes to this case, as the First Circuit did in *Goncalves* v. *Reno*, 144 F.3d 110, 128 (1998), petition for cert. pending, No. 98-835 (filed Nov. 18, 1998). But see *LaGuerre*, 1998 WL 912107, at *5 (stating that "[i]t would border on the absurd" to apply the presumption against retroactivity in this situation). That is incorrect, for the application of Section 440(d) to pending cases would not be retroactive. As the Attorney General concluded in her decision in *Soriano*, Section 440(d) divested her of the power to grant prospective relief from deportation (see Pet. App. 395a-397a); it is thus akin to a statute withdrawing jurisdiction, or altering the terms of permissible injunctive relief *in futuro*. "[T]he relevant activity that the rule regulates," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring in the judgment), is the Attorney General's authority to grant relief from deportation under Section 1182(c), not the alien's criminal conduct or conviction.[9]

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[9] Respondents also submit (Br. in Opp. 28) that the decision below avoids constitutional questions raised by the application of Section 440(d) to pending cases. As we note in our reply brief in *Goncalves* (98-835 Reply Br. 9-10 n.8), the Seventh Circuit has already addressed and rejected some of those constitutional claims in *LaGuerre*, and it is unlikely that the courts of appeals will be able to avoid reaching the constitutional questions entirely. For further discussion of the merits, we refer the Court to our

3. *Proper Case For Complete Review.* Finally, respondents submit (Br. in Opp. 29-30) that if the Court does grant certiorari in one of the pending cases arising out of the application of Section 440(d) of AEDPA, it should grant plenary review in this case, rather than holding it for *Reno* v. *Goncalves*, No. 98-835, or *INS* v. *Magana-Pizano*, No. 98-836. We agree, for the reasons set forth in our response to the conditional cross-petition for a writ of certiorari in this case (No. 98-1160, at 4-6). Now that respondents Navas and Henderson have filed a cross-petition seeking review of the court of appeals' dismissal of their petition for review, the Court could decide both whether Section 309(c)(4)(G) of IIRIRA and Section 440(a) of AEDPA prevented the court of appeals from taking jurisdiction over the various claims in their petitions for review, and whether the district court had jurisdiction over the similar claims raised in Navas's petition for habeas corpus under 28 U.S.C. 2241. In addition, plenary review over the petition and cross-petition in this case would also ensure that the Court could resolve the reasonableness of the Attorney General's decision in *Soriano*, should the Court reject our submission (see 98-996 Pet. 23) that neither the district court nor the court of appeals had jurisdiction to review respondents' challenge to the Attorney General's denial of discretionary relief based on *Soriano*.

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

FEBRUARY 1999

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petition and reply brief in *Goncalves* (98-835 Pet. 24-29; 98-835 Reply Br. 6-9).